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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF GEORGIA
3 ATLANTA DIVISION

4 DONNA CURLING, ET AL., :
5 PLAINTIFFS, :
6 VS. :
7 DOCKET NUMBER
8 BRAD RAFFENSPERGER, ET AL., :
9 DEFENDANTS. :
10

11 TRANSCRIPT OF TELEPHONE CONFERENCE PROCEEDINGS

12 BEFORE THE HONORABLE AMY TOTENBERG
13 UNITED STATES DISTRICT SENIOR JUDGE

14 JANUARY 27, 2022

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21 12:30 P.M.

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PROCEEDINGS

(Atlanta, Fulton County, Georgia; January 27, 2022.)

3 THE COURT: Good afternoon. This is Judge Totenberg
4 here on a teleconference in Curling v. Raffensperger, et al,
5 Case Number 1:17-CV-2989.

6 I think -- well, I'm going to just go through --
7 would the State of Georgia's counsel go ahead and identify who
8 is present.

9 MR. TYSON: Good afternoon, Your Honor. Bryan Tyson,
10 Vincent Russo, and Carey Miller.

11 THE COURT: Okay. And would the Curling counsel
12 indicate who is present.

13 MR. CROSS: Good afternoon, Your Honor. This is
14 David Cross for Curling plaintiffs. I'm not sure who else is
15 on the conference.

16 MR. SPARKS: Good afternoon, Your Honor.

17 MS. KAISER: Good afternoon, Your Honor. This is --
18 go ahead, Adam.

19 MR. SPARKS: Adam Sparks also for Curling plaintiffs
20 also here.

21 MS. KAISER: And this is Mary Kaiser as well.

22 THE COURT: Mr. Cross, Ms. Kaiser, and Mr. Sparks;
23 right?

24 MR. CROSS: Yes. I believe so, Your Honor.

25 THE COURT: All right. And who is here for the

1 Coalition?

2 MR. ICHTER: Cary Ichter here for the Coalition.

3 MR. BROWN: Bruce Brown for the Coalition.

4 MR. McGuire: And Robert McGuire.

5 THE COURT: Very good.

6 And is there anyone present for Fulton County, and
7 who is it?

8 MS. RINGER: Good afternoon, Your Honor. Cheryl
9 Ringer for Fulton County.

10 THE COURT: Thank you, Ms. Ringer.

11 MR. LOWMAN: David Lowman for Fulton County.

12 THE COURT: Good.

13 All right. We also -- I don't know whether they are
14 present or not. But a number of reporters asked to be able to
15 sit in. And that is fine. Though if we end up in some section
16 of the hearing at the end that has -- that I have to do on a
17 confidential basis, I will excuse people accordingly.

18 I don't know whether there is anyone else other than
19 lawyers who are present. But I do just want -- in case there
20 are, I just want to advise everyone that you are not authorized
21 to record the hearing. A transcript will be made available
22 later on. But you are not authorized to record the hearing.

23 So I mean, I would be doing this in open court but
24 for the circumstances and the need to move quickly on this.

25 I think I read everything that you -- the very large

1 volume of submissions regarding discovery disputes that have
2 been submitted. And it seemed like there were seven major
3 disputes and many side disputes. I mean, each one encompasses
4 many different things.

5 I don't know in the time that we have that we are
6 going to be able to converse about all of these issues. And
7 I'm not sure they all need to be conversed about either. But
8 that is why I asked you to please let me know your priorities.

9 I'm sorry that it was so much at the last moment.
10 But it wasn't until I fully understood at 2:30 in the morning
11 that we would never make progress if we had to go through all
12 of this that I decided, you know, I couldn't treat all of the
13 disputes as equal.

14 So I don't know because of the extra half an hour
15 whether the State has been able to add anything. I know I've
16 got something at least from the plaintiffs. But -- and -- I
17 don't think I have anything from any of the defendants at this
18 point.

19 If you've had any opportunity to think about that,
20 Counsel, let me know right now. Otherwise, I'll just proceed
21 accordingly.

22 MR. TYSON: Thank you, Your Honor. This is Bryan
23 Tyson for the State defendants. Mr. Miller was in Dr. Appel's
24 deposition this morning. And we were trying to get our heads
25 together on the question for you.

1 THE COURT: Yes.

2 MR. TYSON: From our perspective, the remaining
3 discovery disputes that are top three, as you indicated, there
4 is a dispute about documents with the Coalition that is kind of
5 connected to the 30(b) (6) that has been pending for -- before
6 the Court as Number 1 on our list in Document 1280.

7 We also had a dispute with the Curling plaintiffs
8 about the documents and communications about the important and
9 time-sensitive issue that is addressed there as Number 2.

10 And then Number 6 regarding Dr. Halderman and the
11 production of documents, that is the other discovery dispute
12 for us that we believe is the top three from our perspective.

13 So Numbers 1, 2, and 6 in our -- and then also, Your
14 Honor, I think the experts that the Coalition has are going to
15 be contingent on the status of the supplemental expert reports.
16 We don't see that -- I mean, it is a connected issue.

17 But since you were asking us for specific discovery
18 disputes, those are the ones we see.

19 THE COURT: All right. Number 6, the Curling -- that
20 you mentioned as the Curling and the Halderman, is this the
21 request about underlying data? Is that what you are speaking
22 about?

23 MR. TYSON: Yes, Your Honor. This is Bryan Tyson.
24 Yes, that is what it is regarding. The document request of
25 Dr. Halderman for underlying data and some of the other pieces

1 of his analysis.

2 THE COURT: Okay.

3 MR. CROSS: Your Honor, this is David Cross. I think
4 I can help us all -- Your Honor, this is David Cross. I think
5 I can help us all.

6 THE COURT: No. Let me just hear -- let me hear
7 first from Fulton County. And then I'll hear from you.

8 MR. CROSS: Okay.

9 THE COURT: Did Fulton County have any priorities?

10 MS. RINGER: Your Honor, this is Cheryl Ringer for
11 Fulton County.

12 We did not ourselves have any priorities. I
13 understand that the Coalition plaintiff has put forth three
14 items. And I believe that there is not really as much of a
15 dispute as outlaid. There is a need for us to supplement our
16 responses. But we have advised that the county has provided
17 what we have.

18 With respect to the so-called intention to exclude
19 the 30(b) (6) witness, I think that is a mischaracterization.
20 Our understanding is that Mr. Brown was on the emails when we
21 were coordinating this with Mr. Sparks as far as the dates for
22 the 30(b) (6) deposition. But we have not made any objections
23 if the Coalition plaintiffs feel like they need additional
24 time.

25 THE COURT: Okay. I'll have to get clear about what

1 that is about. But that is fine. We'll -- thank you.

2 MS. RINGER: Okay. Thank you.

3 THE COURT: And this is relative to what the
4 Coalition wants from you -- is that right? -- as to 30(b)(6)?

5 MS. RINGER: Yes, ma'am. That's correct. That's
6 correct.

7 THE COURT: And which witness is it who is going to
8 be a 30(b)(6)?

9 MS. RINGER: We actually have several. So we have
10 three -- we have three individuals that are identified that
11 were supposed to be deposed last week. We only got to two of
12 them. The third person and the fourth person will be available
13 for deposition on Monday the 31st.

14 THE COURT: So does the Coalition actually have any
15 issue then left about this? Let me just sort of wrap that one
16 part up.

17 Who is going to be speaking for the Coalition?

18 MR. BROWN: Mr. Ichter is.

19 MR. ICHTER: Yeah. I'm not exactly certain. I
20 wasn't involved in the taking of the 30(b)(6) depositions --
21 Fulton depositions that have gone forward at this point.

22 Our issues, as I understand them, more specifically
23 deal with certain documents that have not been produced and
24 then relatedly to who Fulton County would propose to have
25 appear as a 30(b)(6) witness in connection with testifying

1 about subjects related to those documents.

2 THE COURT: All right. Well, I want to deal --
3 partially also because Mr. Cross is going to -- I guess you
4 have to disappear at 2:30, or do you -- or is the plane at
5 2:30?

6 MR. CROSS: The plane is at 3:20. So I have got some
7 time.

8 THE COURT: All right. What were you trying to add
9 right now?

10 MR. CROSS: Well, I was just going to say: The
11 second item on Mr. Tyson's list I think could be resolved. We
12 confirmed that we would produce those documents this week. So
13 I don't think there is any issue there.

14 THE COURT: Okay.

15 MR. TYSON: Your Honor, this is Bryan Tyson. If we
16 receive the documents, that does resolve it for us. But that
17 is the main thing. We just haven't gotten them yet. So if
18 they are going be produced this week, we're good.

19 THE COURT: Okay. Thank you. This has been helpful.
20 I want to start off with a few remarks.

21 A, while I realize there has been some delay because
22 documents were needed before 30(b) (6) depositions could be
23 taken, I remain committed to holding the line on the -- on a
24 deadline for discovery and not letting this roll. As it is,
25 I'm self-critical that I have allowed it to go this long.

1 Though I understand it is a complex case.

2 But the intent here initially really was to have a --
3 you know, develop a necessary but limited record that would be
4 sufficient and updated for me to make some rulings on --
5 threshold rulings on standing.

6 And I realize that the merits issues sometimes
7 obviously are a part and parcel of that. But this is
8 definitely when I look at this pile of disputes and the scope
9 of what we're dealing with beyond what I anticipated. And I'm
10 just not going to let it mushroom any further.

11 So just to deal first with the Curling plaintiffs'
12 issues and to the extent that those are -- some of them may
13 also be overlapping obviously with the Coalition plaintiffs and
14 also related to perhaps what the State defendants have. The
15 first issue was the state secrets privilege claim.

16 And I have reviewed the briefing on that. I don't
17 think that there's much that has been established that really
18 is kind of really strictly in conformity with state secrets
19 that normally deal with military defense and national defense
20 and sometimes pursuant to a statute or something else.

21 Though I do think that the State made an important
22 point in referencing the way in which the critical
23 infrastructure under federal law is certainly a high value and
24 needs to be protected. And critical infrastructure, as we
25 know, does include election structure -- the election system.

1 And we dealt with that a number of years ago just even in the
2 testimony about the significance of protecting critical
3 election infrastructure.

4 And so that is the closest it seems to me that we get
5 to really having legal authority about what the kind of
6 national significance is of maintaining and protecting the --
7 the functionality of the infrastructure of the election system,
8 which also can require protecting -- that it is not -- that it
9 is actually fully protected and we look at its vulnerabilities
10 also.

11 I thought that the -- all of that said, there is --
12 whether it is from Fortalice or from the State's own computer
13 folks and IT folks or the plaintiffs' own experts, everyone
14 works with confidential data that in the wrong hands, whether
15 that be foreign or otherwise, can be -- jeopardize the
16 integrity of the system.

17 And I thought that the offer that had been made by
18 the defendants to provide some form of redacted report from
19 Fortalice was perfectly reasonable. There seemed to be some
20 hiccup about cost. But why don't you -- I don't know why you
21 couldn't split the cost.

22 Is there any reason why we wouldn't proceed in that
23 way? This is to Curing plaintiffs.

24 MR. CROSS: Your Honor, this is David Cross. We
25 certainly are fine with the redactions, and I did just want to

1 make sure the record is clear. We actually were the ones that
2 proposed that back in November.

3 THE COURT: All right. I saw that too.

4 MR. CROSS: So I just wanted to make sure. The
5 redaction -- it is hard for me to say in the abstract because I
6 don't know the cost. If it is a nominal cost, then I don't
7 think I have a problem splitting it.

8 But we do view this as party discovery because the
9 State is the one that is asserting the privilege. It is their
10 agent. And even if you do it on a proportionality assessment,
11 these are highly, highly relevant documents.

12 And so it is not like we're asking for something that
13 is marginal here and you might shift the cost for that basis.
14 So I would respectfully ask that we don't bear any of the
15 costs. But if it is a nominal expense, we won't litigate that.

16 MR. TYSON: Your Honor, this is Bryan Tyson for the
17 State defendants. Since we have got the email yesterday
18 evening asking for the cost estimate, we sent that immediately
19 to the counsel for Fortalice. Their folks are working on that,
20 and we talked to them just before we got on the call here.

21 They indicate they will have an estimate of that by
22 tomorrow. So that is -- we will have an estimate at that
23 point. And then we'll know the answer. And I apologize we
24 don't have that for you today.

25 Mr. Cross is correct. And in talking to Fortalice,

1 the redactions -- we had remembered that being a redaction of
2 some different documents. But I think that that is a
3 reasonable solution if we can get there. And we should have
4 that cost estimate in place by tomorrow, according to what the
5 folks said -- Fortalice counsel have told us just a few minutes
6 ago.

7 THE COURT: All right.

8 MR. CROSS: Your Honor, if I may, I have one
9 follow-up question on that.

10 THE COURT: Yes.

11 MR. CROSS: In addition to cost, also timing.
12 Because we have the depositions coming up next week. I mean,
13 we would be open to pushing those out by some short measure if
14 we had to. But we do want to make sure we get these documents
15 before the 30(b)(6) testimony.

16 So, Bryan, I don't know if you have any insight as to
17 the timing.

18 MR. TYSON: Again, Bryan Tyson. I don't have any
19 insight into timing. I think what the Fortalice folks -- and
20 folks here can correct me if I'm wrong. What they described
21 they were working on was a proposal that would be basically
22 redacting the information from all of the documents where state
23 secret privilege was asserted, which is probably going to be
24 extremely expensive. Because like one of the documents alone
25 is 19,000 pages long.

1 Doing a subset, such as the reports and the drafts
2 that were provided to the Court, is probably going to be
3 substantially less. But we were trying to get estimates on all
4 of those universes so then we could make a call on that.

5 THE COURT: Well, the 19,000-page report, which I did
6 not -- or whatever it was, was not -- must have been data
7 runs -- right? -- rather than -- because I read every single
8 report.

9 MR. TYSON: Yes, Your Honor.

10 THE COURT: Okay.

11 MR. TYSON: Yes, Your Honor. Bryan Tyson. That is
12 some of the output from the data. Those were included in the
13 assertion of state secrets privilege because they included IP
14 addresses and a variety of specific kind of computer routing
15 information about the Secretary's network.

16 THE COURT: Okay. So is it your plan to give
17 alternative estimates that include -- you know, if we include
18 this, it is going to be this much; if we include that, it will
19 be that much?

20 MR. TYSON: Yes, Your Honor. Bryan Tyson again.
21 That is our plan to have -- if you want to do all the documents
22 over which a state secret was asserted, if that is what the
23 plaintiffs are looking for, we'll have a number on that. If it
24 is just the reports, that is obviously much quicker and easier.
25 The ones that you reviewed, that's much quicker and easier and

1 simpler and probably dramatically cheaper. So we wanted to
2 have both of those options available.

3 THE COURT: All right. Good. All right. I'm going
4 to view that as resolved.

5 The Curling plaintiffs next listed other Fortalice
6 reports and related communications State defendants have not
7 produced. I don't know what that means separate from Number 1.

8 MR. CROSS: Yes, Your Honor. This is David Cross.
9 It is possible it overlaps. We just don't know because we
10 don't know what all is in the universe of Fortalice reports.

11 What we do know is that there were task orders, for
12 example, that the State produced that indicate what Fortalice
13 has done. And I won't get into the specifics on that here.
14 But Fortalice has done some continuing cybersecurity consulting
15 work for them into 2020 and 2021. And that for those projects,
16 there were monthly reports.

17 And we also know that Fortalice also did penetration
18 testing at least on an annual basis and it sounds like a
19 general cybersecurity assessment. And there was at least an
20 email report for that.

21 We have been through the production from both
22 Fortalice and the State. And we haven't found those reports.
23 And so we were trying to figure out if we're going to get them.

24 THE COURT: I think the penetration testing is among
25 the reports that I reviewed.

1 MR. CROSS: Okay. So maybe that overlaps.

2 THE COURT: Yeah. I may be wrong. I mean, I know it
3 is. But I don't know whether there is something else.

4 All right. Mr. Tyson, do you want to say anything
5 more about this?

6 MR. MILLER: Your Honor, this is Carey Miller. And
7 I'll speak to this briefly.

8 You know, from what I understand from the monthly
9 reports, I'm not frankly entirely sure if they were reduced to
10 writing. I do recall some testimony of Mr. Hamilton, the
11 Secretary of State's former CSO, talking to -- essentially that
12 the Secretary wasn't necessarily receiving the report.

13 I truly don't have enough personal knowledge to
14 answer that question. But I have a strong suspicion that what
15 you are referring to is reflecting those reports.

16 THE COURT: Okay.

17 MR. CROSS: Your Honor, this is --

18 THE COURT: Go ahead.

19 MR. CROSS: This is David Cross. I guess the only
20 thing I would just ask is that we -- if the State would commit
21 to follow up with their client and make sure that they have
22 searched and collected these.

23 I mean, I understand it may overlap with the stuff we
24 got from Fortalice. But the State should also have these
25 documents. And they have been operating through staff from

1 Fortalice.

2 And my understanding from the Hamilton deposition was
3 that these were written reports that went to Mr. Beaver. So if
4 we could just get it from the State that they will make sure
5 they search for whatever they have, then I think that resolves
6 it. And we want them before the 30(b)(6) depositions.

7 **(There was a brief pause in the proceedings.)**

8 THE COURT: Are you in a spot that you can speak more
9 clearly? The court reporter, Ms. Welch, is having trouble
10 catching everything you are saying.

11 MR. CROSS: Sorry. I'm in a car headed to the
12 airport.

13 Can you hear me okay?

14 THE COURT: It is just that somebody else also is
15 speaking.

16 COURT REPORTER: I think it is an echo.

17 MR. CROSS: Yeah. I think it is the Uber driver's
18 nav. Sorry.

19 **(A discussion ensued off the record.)**

20 THE COURT: All right. Well, I take it, Mr. Miller,
21 that you will check on that. Is that --

22 MR. MILLER: Yes, Your Honor. We certainly will.
23 And frankly we'll probably also check directly with Fortalice,
24 which probably will be able to locate things a lot easier.

25 THE COURT: I bet that is true. Thank you.

1 And I don't know which defense counsel of the State's
2 counsel is going to respond to this. But there is an alleged
3 refusal to provide verification for the State's interrogatory
4 answers.

5 Is that a refusal, or you just haven't gotten around
6 to it?

7 MR. TYSON: Your Honor, this is Bryan Tyson. My --
8 I'll rely on Mr. Russo and Mr. Miller. They have better
9 knowledge than I do on this.

10 But my recollection is it was a matter of we needed
11 verifications from the Curling plaintiffs, they needed
12 verifications from us, and that we just hadn't gotten around to
13 it.

14 I don't think we are refusing to provide
15 verifications to interrogatories.

16 MR. RUSSO: That is true. This is Vincent Russo,
17 Your Honor. We're not refusing to provide verifications by any
18 means.

19 But we just wanted to make sure all parties are
20 providing them. We hadn't received any in this case either.
21 So that was it.

22 THE COURT: Okay. Well, obviously everyone needs to
23 be providing verifications. You-all should -- what is a
24 reasonable drop-dead date for verifications in your mind? Is
25 it February 15?

1 MR. CROSS: Your Honor, this is David Cross. We --
2 I'm sorry. This is David Cross.

3 **(Unintelligible cross-talk)**

4 THE COURT: Go ahead.

5 MR. CROSS: Because we wanted them before the
6 depositions just so we know who is (unintelligible) --

7 THE COURT: All right. Well, who is -- when is your
8 next deposition?

9 MR. CROSS: We have Chris Harvey tomorrow. And then
10 after that, the State's next deposition is February 2nd,
11 unless -- and I was going to raise this, Your Honor. I realize
12 I didn't put this in our list of three because I didn't realize
13 this was a dispute until I read the State's filing on Jordan
14 Fuchs.

15 We designated -- we noticed her for deposition on
16 Monday. I saw they objected to that in a filing to the Court.
17 So that is an important dispute that we need to resolve.

18 THE COURT: Well, does Mr. Harvey -- was the State
19 planning to have Mr. Harvey sign any of the verifications? And
20 I realize sometimes you have more than one person filing --
21 signing a verification on the interrogatories.

22 But is she --

23 MR. TYSON: And, Your Honor, this is --

24 THE COURT: Go ahead.

25 MR. TYSON: I'm sorry.

1 THE COURT: Go ahead.

2 MR. TYSON: Your Honor, this is Bryan Tyson. We were
3 not planning to have Mr. Harvey verify. He is no longer an
4 employee of the Secretary's office. So we're going to have to
5 have kind of multiple most likely Secretary employees do those
6 verifications.

7 THE COURT: Okay. All right. Well, then we don't
8 have the problem for tomorrow, in other words. But we have it
9 for follow-up ones. So I think then we really have -- people
10 have to move and get it done before the depositions of those
11 individuals.

12 And my understanding -- and this sort of relates to a
13 number of different things about the -- that all parties have
14 raised is the question of the number of individuals who have
15 been identified for 30(b) (6) depositions.

16 And I wasn't sure whether the Jordan Fuchs -- I'm
17 just -- imperfect recall now from looking at the materials.

18 Did the deletion of Jordan Fuchs come when the
19 plaintiffs asked for the potential deposition of Mr.
20 Raffensperger, from the State's perspective?

21 MR. CROSS: No, Your Honor. Those are unrelated. We
22 had asked --

23 COURT REPORTER: I'm sorry. Who was that?

24 THE COURT: Mr. Cross.

25 Go ahead.

1 It is Mr. Cross speaking.

2 MR. CROSS: Sorry. It is Mr. Cross.

3 We had asked -- we had indicated I think back in 2020
4 that we wanted -- we would need to take a deposition of
5 Ms. Fuchs once we got the deposition discovery and has served
6 some discovery specifically related to her as the State noted.
7 So we had been seeking her deposition for quite some time. It
8 is unrelated to Secretary Raffensperger.

9 THE COURT: Well, what is Ms. Fuchs' scope of
10 responsibility? And I'm going to ask the State defendants to
11 respond to that.

12 MR. TYSON: Your Honor, this is Bryan Tyson.

13 Ms. Fuchs is the Deputy Secretary of State. So a lot of her
14 stuff is more administrative in nature.

15 If you will recall, the issues involved with
16 Ms. Fuchs were a subpoena was served on her in the aftermath of
17 the 2020 election trying to secure documents from her. And we
18 had a discovery dispute, which is 1026, which kind of
19 encapsulates everything there on what was being sought and what
20 the issues were. So that is all filed on the docket there.

21 And we don't recall any -- her deposition ever being
22 raised. What we recall is a -- when we discussed it, there was
23 a subpoena for records and those kind of things. But we don't
24 recall when we met and conferred about it with the plaintiff
25 that we ever discussed a deposition.

1 And Mr. Miller may have something more to add on that
2 point. But that is what I have.

3 MR. MILLER: Your Honor, Mr. Tyson has largely hit
4 the nail on the head. I think the issue was frankly we had a
5 conferral -- I can't recall the exact date off the top of my
6 head. It was sometime around the first week of January -- that
7 actually discussed the discovery dispute related to the
8 important and time-sensitive issue and at plaintiffs' request
9 also included what we understood to be a comprehensive
10 discovery scheduling plan between the State defendants and the
11 Curling plaintiffs.

12 And at that point, Ms. Fuchs' deposition was not
13 raised, at least according to my recollection and my notes from
14 the call. So we understood at that point Ms. Fuchs was off the
15 table. And, frankly, I don't recall getting much communication
16 about this since around 2020. Obviously a lot has happened in
17 this case. I might have missed something.

18 But we would also raise, Your Honor, that at this
19 point, setting Ms. Fuchs aside, the Curling plaintiffs have now
20 either taken or scheduled the depositions of 11 different fact
21 witnesses. And that includes those that are 30(b) (6)
22 representatives that we understand are also being deposed in
23 their 30(b) (1) capacity in a consolidated deposition.

24 And, of course, that goes beyond the rules as
25 required without leave of court. Setting that aside, we

1 just -- frankly, I'm not entirely sure what exactly Ms. Fuchs
2 is going to testify that is relevant to this case as opposed to
3 relevant to the discovery dispute that is pending on the docket
4 at 1026.

5 THE COURT: All right. Could -- Mr. Cross, what is
6 the -- why are you seeking Ms. Fuchs' deposition?

7 MR. CROSS: Your Honor, she appears on a lot of key
8 documents that have been produced because of her role at the
9 Secretary's office, including documents that -- you know, I
10 won't get into the substance but address security issues
11 involving the election system. And she obviously has a senior
12 prominent role there.

13 She also is the spokesperson for the Secretary's
14 office speaking on election security issues and speaking about
15 this litigation and our clients in particular. So I think
16 she's right at the heart of what is relevant to this case.

17 I think it is going to be a short deposition. No
18 more than a half day.

19 **(Unintelligible cross-talk)**

20 THE COURT: On the -- I'm just trying to square this
21 with document -- what was in Document 1026. At that point, you
22 were seeking a very narrow and necessary discovery from her
23 that concerned public statements she made about this case which
24 related to just simply basically her perceptions of the case
25 that didn't have credibility.

1 But why do I need -- why do you need to spend time on
2 that?

3 MR. CROSS: Again, Your Honor, that would only be a
4 very small piece of it. That is probably five minutes out of
5 the deposition.

6 (Noise interference)

7 MR. CROSS: It is more that she, again, is on key
8 documents (unintelligible) once we can review their documents
9 now.

10 THE COURT: You are going to have to talk louder.

11 (There was a brief pause in the proceedings.)

12 THE COURT: Well, what are the other matters?

13 MR. CROSS: Is this better?

14 THE COURT: I mean, you are just saying she's a
15 signatory or CC person on this correspondence?

16 MR. CROSS: Sorry, Your Honor. Can you hear me now?

17 THE COURT: Yes. That is much better.

18 MR. CROSS: Okay. So she is on key documents. I
19 mean, I can't really talk about those specific documents here.
20 So I guess I'm not sure how to answer that question.

22 THE COURT: I did. I just don't know what to do with
23 -- I have no idea what you are talking about. It is a -- your
24 other 30(b)(6) witness -- is she a 30(b)(6) witness, or is she
25 something else?

1 MR. CROSS: She's not been designated as a 30(b) (6).

2 Your Honor, I'll just make this easier because I know
3 there is a lot that everyone has to deal with today. We will
4 park Ms. Fuchs and get through with the 30(b) (6) deposition.
5 And if we have issues that we think we need to cover with her,
6 we'll circle back to the State at that point.

7 THE COURT: Thank you. Thank you.

8 All right. So then you have then Mr. Beaver,
9 Mr. Sterling, and Mr. Barnes for the 30(b) (6) depositions. And
10 that is not in contest, as I understand it?

11 MR. TYSON: Your Honor, this is Bryan Tyson. That's
12 correct. Those are the designees, and I think we're good on
13 those.

14 THE COURT: And Mr. Harvey also, I guess?

15 MR. TYSON: Yes. I think Mr. Harvey may have one or
16 two subtopics.

17 MR. MILLER: Yes, Your Honor. I don't want to spring
18 this on the Curling plaintiffs.

19 THE COURT: And this is Mr. Miller? Just for the
20 record, this is Mr. Miller speaking now?

21 MR. MILLER: Yeah. I'm sorry. Yes.

22 I don't know that we can directly address
23 Mr. Harvey's deposition tomorrow. We're assuming that is
24 intended to be the consolidated 30(b) (1) and 30(b) (6). I did
25 just want to clarify that. But like I said, I don't mean to

1 spring that on anybody.

2 MR. CROSS: Yes. This is David Cross. I think what
3 we had told the State was: To the extent we had questions for
4 any of these witnesses in their personal capacity, we would
5 just run that in parallel with the 30(b) (6) and try to just get
6 all that done in one day for each of them.

7 THE COURT: Okay. As long as that is fine with the
8 defense counsel.

9 All right. So those were your priority items. And
10 I'm now just going to move to what the State has about the
11 Curling plaintiffs because, again, at some point I gather that
12 Mr. Cross needs to disappear.

13 It looked like the State's highest concern was --
14 relative to Curling was this Halderman underlying data -- and
15 the supplemental experts, were those all -- the supplemental
16 experts, those were of the Coalition, weren't they?

17 MR. MILLER: This is Carey Miller, Your Honor.
18 That's correct.

19 THE COURT: All right. So my understanding was from
20 reading the materials that at some point plaintiffs offered for
21 representatives of the Secretary of State's office -- their
22 expert to come to Michigan and review underlying data and
23 software used by Dr. Halderman but now say, well, you know,
24 because of the passage of time, we're not willing to do that.

25 But it seems to me that that is a viable way of

1 proceeding. I'm not sure other than everyone's own
2 intransigence and the dynamics of this case why we wouldn't try
3 to -- that seems like a reasonable way of proceeding without in
4 any way compromising security of the -- of the software and it
5 could give -- would give the State defendants the underlying
6 information it is looking for.

7 MR. TYSON: Your Honor, this is Bryan Tyson. Again,
8 I know a lot has happened in this case. And I'm sure someone
9 will correct me if I'm wrong.

10 But I don't recall a post Dr. Halderman's report
11 before his deposition -- an offer for us to come and review
12 documents in his lab or anywhere else. I know there was some
13 discussion of that when we were doing DREs and we were doing
14 GEMS and all that kind of thing. I think that was like two
15 years ago when we were first talking about the GEMS databases
16 and those kind of things.

17 And Mr. Miller is signaling for me that he went up to
18 the University of Michigan at that time -- Morrison Foerster's
19 office -- I'm sorry -- in Washington.

20 But I think that's a workable solution if it is what
21 would work. I mean, I think the objections that the Curling
22 plaintiffs made in Document 1246 were that we were too late and
23 it wasn't relevant kind of apart from this is super secret
24 stuff. We just -- our experts, I think, need to be able to
25 test and look at these things.

1 And ultimately, Your Honor, we don't see a reason
2 though -- I mean, again, I think we have talked back and forth
3 about all of the different ways to handle secure information in
4 this case. And if the only way we could do it is going to
5 Dr. Halderman's lab, that just also seems very far afield from
6 what would be necessary here to go and do that, especially
7 for -- we have consulting experts that are not disclosed that
8 we would want to have review this -- assist us in our
9 preparation. Obviously their identity would be known if they
10 had to travel to Dr. Halderman's lab.

11 So for all those reasons, that is kind of where we
12 are on that, just looking at that issue.

13 THE COURT: Well, I think -- I mean, I do understand
14 completely why the State says -- you can't just say, well, it
15 is either too late or you have to -- the State has a legitimate
16 interest in being able to understand the way in which
17 Dr. Halderman proceeded in his analysis and whether -- he
18 probably has some proprietary interest himself in whatever
19 software that he has used or his methodology though, just as
20 everyone else is trying to protect the security of their own
21 software. But it is more so in the event it were to be in any
22 way loosely used.

23 So that is why in my view since you are not planning
24 to have -- I gather -- I mean, unless Dr. Gilbert is going to
25 be testifying -- I mean, that would have been an easy way if

1 you told me Dr. Gilbert is testifying about this and he is --
2 so provide the information to Dr. Gilbert. I don't --

3 MR. MILLER: Your Honor, I apologize. This is Carey
4 Miller. I don't mean to interrupt.

5 THE COURT: No. That is all right.

6 MR. MILLER: The question you were posing there, just
7 so I understand it, was that essentially is Dr. Gilbert going
8 to be the one looking at this? Is somebody else? And is
9 somebody going to be testifying to it? Do I understand that
10 correctly?

11 THE COURT: No. Because I gather that no one is
12 testifying as to it because you have -- unless Dr. Gilbert
13 hasn't been -- unless there is still a supplemental affidavit
14 for Dr. Gilbert because you haven't identified another expert
15 that I recall that was --

16 MR. MILLER: Your Honor, I apologize. The State --
17 and this is Carey Miller again. The State does not intend to
18 provide a supplemental report of Dr. Gilbert.

19 As the Court is aware from our position on the
20 Coalition plaintiffs' supplemental report, that is just begging
21 for an endless continuation of discovery.

22 THE COURT: Right.

23 MR. MILLER: However, the review and analysis will
24 directly go to cross-examination and litigation strategy of the
25 defendants. And respectfully, Your Honor, I understand the

1 Curling plaintiffs' position to the extent they don't want to
2 be sandbagged with a supplemental report. However, I don't
3 necessarily agree that the State is required to disclose their
4 litigation strategy.

5 MR. CROSS: Your Honor, this is David Cross. I think
6 what Mr. Miller is saying highlights our concern. That Your
7 Honor set a schedule for expert discovery. That closed the
8 first week of December, from what I recall.

9 We're talking about a report that they got, I think,
10 July 1 of last year. And the purpose of expert discovery is
11 that each side is on notice of what the other side is going to
12 put into the record and, you know, what rebuttals they have to
13 each side's expert.

14 To say that now, you know, a few days before the
15 close of fact discovery, which was extended only for
16 supplemental stuff, they are going to bring in consultants that
17 we don't know about to look at information that includes
18 software that can hack elections and then they are going to use
19 that in the case, it just defeats the whole purpose of Rule 26
20 on expert disclosures. And it defeats the purpose of the
21 schedule Your Honor entered last year.

22 THE COURT: Let me stop you. Let me stop you just
23 for one second.

24 All right. All right. I've got a little bit too
25 many documents in front of me at the moment.

1 But, see, the thing about it is yes, there was -- I
2 understood your argument why it was not timely. But it is not
3 quite -- what it ignores is the fact that you have this double
4 asterisk that says -- in the table that is in Document 1238,
5 the consent basically extension, denotes that expert discovery
6 means discovery of matters contemplated by Rule 26(a) (2) and
7 (a) (4), in other words, discovery of facts and data that
8 experts considered or relied on for their opinions disclosed in
9 their reports and declarations.

10 And that particular one allowed for -- the double
11 asterisk one, which I don't think I have got the right one in
12 front of me -- allowed it to go, I think, until -- yes,
13 February 15, 2022. And that was different from the earlier
14 date for defendants' expert rebuttals, if any, to plaintiffs'
15 supplemental expert reports and any guidelines for supplemental
16 reports.

17 So that is I think what they are really traveling on.
18 We're not trying to do an expert report. We're just trying to
19 have -- basically understand what Dr. Halderman did so that we
20 can effectively cross-examine him, if this case goes to trial.

21 They can't use it in a summary judgment because they
22 don't have an expert who is going to testify about it. They
23 could point out probably issues as to the mode of analysis.
24 But they can't -- there is not much more than that they can do.

25 But I don't understand -- I don't think it is

1 untimely from that perspective that they are entitled to know
2 what the data is that is the -- and programming that is the
3 basis of his analysis.

4 And I don't know how you run away from the double
5 asterisk in this November 24 filing of the consent extensions.

6 MR. CROSS: Yeah. I apologize. I don't have that --
7 this is David Cross. I don't have it in front of me.

8 My recollection of what we negotiated and agreed to
9 -- certainly what was intended because I do remember spending a
10 lot of time on this -- was that the only expert discovery that
11 could continue beyond December 6 or whatever the date was was
12 supplemental expert discovery on facts or data that were not
13 previously available to the parties.

14 And I think as I understand it, this is Mr. Miller's
15 objection to the reports that come in from the Coalition
16 plaintiffs. I take no position on that issue. But I don't
17 think they can have it both ways and say that they get to take
18 discovery on the report they got on July 1 where they say they
19 need facts and data. They have already deposed him. If this
20 is information they needed, they would have asked for it weeks
21 or months before his deposition, not just a couple of days
22 before his deposition and just a few -- shortly before the
23 expert cutoff.

24 So in our view, it is untimely. And it certainly is
25 not at all what was intended in the supplemental expert

1 discovery. We weren't waiving any objections on this.

2 And the last point I'll just make, Your Honor, is I
3 am very concerned about the prejudice. Because what is going
4 to happen is exactly the sandbagging that Mr. Miller sort of
5 hinted at, which is they are going to file a summary judgment
6 brief and they may not have, you know, a new report from
7 Dr. Gilbert or anyone else. But they are going to have
8 arguments in there that are going to be technical in nature and
9 they are going to say Dr. Halderman did this, that, or the
10 other thing.

11 The only way they can make those arguments is by
12 relying on their consulting experts, which they have admitted
13 because those are the ones they want to look at this underlying
14 data that they say they need to look at. That means we're
15 going to get a summary judgment motion that is going to have
16 new arguments from undisclosed experts that we have never seen.
17 And we don't even get to depose the people who are doing the
18 analysis that they are going to rely on because they are hiding
19 them -- hiding is not -- that is not a fair word. They are
20 designating them as consulting experts.

21 Whether that is deliberately or not, the result is we
22 don't get to question the people they admit they are going to
23 rely on to attack Dr. Halderman's report. They designated two
24 experts in this case --

25 MR. MILLER: Your Honor --

1 MR. CROSS: -- Dr. Adida and Dr. Gilbert. Those are
2 people that they are obligated to rely on for the evidence and
3 the arguments they are going to make. That is not the role of
4 a consulting expert.

5 So I'm just -- I'm really worried about what we're
6 going to see in a summary judgment motion with no ability to
7 understand what is behind it for Dr. Halderman to be able to
8 respond to it. And it is just going to push the schedule out
9 because we're going to be coming to Your Honor saying we can't
10 possibly respond to all of these new arguments about his expert
11 report in the window we have for summary judgment.

12 That is why we're supposed to be wrapping things up
13 and not doing things that should have happened last summer.

14 MR. MILLER: Your Honor, this is Carey Miller. If
15 the Court would allow me to address some of the arguments there
16 just briefly.

17 THE COURT: All right.

18 MR. MILLER: Respectfully, the discovery request was
19 served, as I understand it -- I think it was October 18 when we
20 took that deposition -- shortly before then -- shortly before
21 the deposition. And, frankly, it doesn't even go with the
22 double asterisk. It goes with the single asterisk in the
23 scheduling order which says -- provides for the resolution of
24 discovery disputes that are currently outstanding or may arise
25 upon the provision of the currently pending productions and

1 responses.

2 As I recall, we recognized that the dispute was out
3 there because we got an objection from the Curling plaintiffs
4 shortly before our November 19 hearing. We convened the
5 meet-and-confer shortly thereafter where we discussed whether
6 Curling plaintiffs were intending to continue to rely on
7 Dr. Appel. Also discussed the discovery dispute and met and
8 conferred before filing the discovery dispute.

9 So, Your Honor, this is an issue that the State
10 served before the close of fact discovery, before -- excuse
11 me -- before the close of expert discovery before the Court's
12 order or most recent order extending the schedule. So I really
13 don't believe the time limit arguments are accurate.

14 But with respect to summary judgment, as we
15 represented to Your Honor, I think Mr. Cross is right as to we
16 would be taking conflicting positions if we were to file a
17 supplemental report. That is not what we're intending to do.

18 As to the use of summary judgment, I'm a little
19 confounded by that because to the extent there is a dispute of
20 material fact, which I have a hard time imagining this not
21 being a material fact, you know, it is truly not going to
22 matter with respect to summary judgment. It is for trial.

23 And the Court will recall when we were permitted in
24 very short order to go to DC to review the infected memory card
25 that Dr. Halderman utilized in the hearing before Your Honor

1 back in 2018, frankly, before State defendants' current counsel
2 became a part of this case. And, Your Honor, without
3 disclosing too much on, you know, our strategy or on a public
4 phone call, but the reality is that's simply not what it was
5 purported to be.

6 And for those reasons, Your Honor, the State will be
7 severely prejudiced if we are not permitted to get the data
8 that is underlying the expert witness who we understand to be
9 essentially the foundation of plaintiffs' case as far as it
10 concerns the merits.

11 Your Honor, we respectfully think that we're going to
12 have this case resolved at summary judgment on jurisdictional
13 issues. But we have to defend for all contingencies right now
14 and be prepared to go to trial on the merits.

15 THE COURT: So would it be -- if I order the data --
16 underlying data and programming to be provided, would it be
17 provided to counsel directly and subject to some type of
18 protective order? Is that what you envision?

19 MR. MILLER: That is correct, Your Honor. We would
20 have -- in fact, their consulting experts already have executed
21 the protective order agreement to be bound just in the event
22 something were to arise we need them to address.

23 But, Your Honor, counsel can receive it, or we can
24 have our consulting expert receive it. But respectfully, Your
25 Honor, we don't -- we don't necessarily believe that we're

1 required to disclose the consulting experts.

2 And if it is something that the Court wants to be an
3 intermediary on, we could do that. That is kind of where we
4 stand right now.

5 And one thing I forgot to mention earlier is that,
6 you know, when Dr. Halderman's report was filed after he had
7 about ten months to put it together, the State had 14 days to
8 respond. We are again not intending to sandbag anybody here.
9 We're trying to prepare for trial on the merits in the event we
10 get there.

11 THE COURT: Okay. All right. Well, I would like,
12 first of all, for the State to provide me what you are -- and
13 suggesting as an appropriate process and protective order for
14 this. I mean -- and also obviously provide the Curling counsel
15 with it so that they can go over it also with Dr. Halderman.

16 And I would like to see this to happen ASAP for you
17 to share that with them. And I will think about the question
18 of their being -- advising me about the consulting experts.
19 I'll get back to you about that.

20 But I would like to see, you know, basically an
21 appropriate chain of command. I mean, we're talking about
22 Dr. Halderman's -- at this point as what he does is obviously
23 attempt to -- as we have heard about from other witnesses who
24 do this is they try to determine whether they can break into a
25 system and how they do that and examine it that way.

1 And that is a standard way -- that is what
2 penetration testing is in a different way than the Fortalice
3 group does. And so it all is -- obviously needs to be
4 protected enough so that we can -- are not in any way
5 endangering the integrity of -- the functionality of the
6 election system whether here or other places.

7 So I would like to understand exactly how this is
8 going to work. So just work on that and send it to Mr. Cross
9 and his co-counsel and --

10 MR. CROSS: Your Honor, this is David Cross. Could I
11 just ask one question?

12 Just put aside our timeliness objections and all
13 that. The biggest concern we have on this is the software that
14 Dr. Halderman has developed that would actually hack votes on
15 the BMD equipment that is used here. But Your Honor might
16 recall we had the same discovery issue come up with the DREs.
17 And what Your Honor ordered there was for the State's expert
18 who at the time was Theresa Payton from Fortalice to come and
19 inspect that in our office in DC.

20 You know, there are certain maybe underlying facts
21 and data that we could provide to the State. And Dr. Halderman
22 and us -- we would be comfortable with sufficient protective
23 measures. And we can discuss that with the State, as you said.

24 And the one thing that I just have to be really clear
25 about is, with all due respect, Your Honor, we are really not

1 comfortable providing vote hacking software to anyone, no
2 matter what the protective measures are. And I would really
3 respectfully urge Your Honor to carve that out if you end up
4 requiring us to provide any additional --

5 THE COURT: Well, why don't you propose how you think
6 that -- I mean, obviously they would prefer you not to know who
7 their consulting experts are. But you need to make a proposal
8 as to how that -- even if it did mean you got to know who they
9 were -- but how that would be handled alternatively.

10 Because this is something that Dr. Halderman has
11 thought about. He had other proposals obviously also for how
12 to deal with it.

13 But I think this obviously is a big issue. So you
14 can -- you-all need to swap that ASAP so that we can get this
15 done.

16 MR. CROSS: Okay. Thank you, Your Honor.

17 THE COURT: And, Mr. Miller, would you also -- you
18 were reminding me about the exchange about all of this in
19 October or November.

20 Would you just either now or, you know, tell me what
21 the document number where you first asked for this or send it
22 to Ms. Bradley, the number that I'm --

23 MR. MILLER: Yes, Your Honor. The discovery dispute
24 regarding Dr. Halderman is filed at Doc. 1246. I do believe it
25 came sometime after the conferrals and objections were had.

1 But attached to that are the initial objections that
2 Curling plaintiff served and the supplemental objections they
3 served.

4 And, Your Honor, we can address this --

5 THE COURT: All right. I mean, I have the one from
6 January. I'm just trying to figure out -- you were talking
7 about an October sequence.

8 MR. MILLER: The timeline. I understand.

9 THE COURT: That's what I -- I mean, I understand
10 what you have got in 1246. My problem is what is before that,
11 which you were referring to that you had done everything on a
12 timely basis and asterisk one applied.

13 So I'm just trying to really make sure I understand
14 that argument but without getting lost in the weeds.

15 MR. MILLER: I understand, Your Honor.

16 MR. CROSS: Your Honor, this is David Cross.

17 MR. MILLER: I do think -- I do think I might have --
18 I think it was actually November or probably November 17. I
19 think it was just a couple of days before the --

20 THE COURT: Hearing?

21 MR. MILLER: -- hearing.

22 THE COURT: Right.

23 MR. MILLER: And then --

24 MR. CROSS: That's right.

25 MR. MILLER: At that hearing, you know, Your Honor

1 directed the Curling plaintiffs to let us know whether they
2 were going to rely on Dr. Appel. And then we separately had
3 this discovery dispute going -- well, anticipated discovery
4 dispute because we had objections and then were rolling right
5 into Thanksgiving.

6 So shortly after Thanksgiving, I believe Mr. Cross
7 had a trial that didn't settle, if I recall correctly. But
8 shortly after Thanksgiving, we got on the phone. And that is
9 where the -- that is when the conferral happened.

10 But I will look back through my calendar and emails
11 and piece those dates together.

12 THE COURT: Okay. And then send that to Ms. Bradley.
13 Thank you.

14 MR. MILLER: Yes, Your Honor.

15 THE COURT: And in case of confusion, they are two
16 different people. Either one -- you can send to Mr. Palmer or
17 Ms. Bradley anything. They will share it with each other. I
18 just decided two people needed to replace Holly.

19 MR. MILLER: For this case, two people is probably
20 the minimum required, Your Honor.

21 THE COURT: So, anyway -- okay. I think we're moving
22 forward with that. But I would -- you know, I don't want this
23 to fester.

24 So I don't know -- do you think that we can get
25 this -- when do you think the earliest is I can get

1 something -- proposal from you that you have also circulated --
2 that you have also circulated to and talked about to Mr. Cross?

3 MR. MILLER: Your Honor, I'll talk to our consulting
4 experts immediately. I would expect that -- you know, by early
5 next week I would expect.

6 THE COURT: All right. Thank you. Thank you. I do
7 have a trial the following week unless it goes away. The
8 schedule right now is extremely volatile because of it. It
9 always is. But it has gotten more so because of the fact that
10 any moment somebody may get COVID and throw the trial off. But
11 we'll see.

12 So I think that is everything that related to the
13 Curling plaintiffs that was a high priority item because I
14 thought the State's other matters related to supplemental
15 experts. That was the Coalition and the Coalition's documents.

16 And those didn't relate to the Curling folks; right?

17 MR. MILLER: Your Honor, I believe the only item that
18 is remaining is Number 8 in our filing at Doc. 1280, as far as
19 high priority items, which is interrogatory responses for which
20 the Curling plaintiffs reserved responses until 30 days prior
21 to the close of discovery.

22 Your Honor, we can address that with the verification
23 issue. But I think that is the only thing remaining.

24 THE COURT: All right. I mean, to the extent that
25 anyone is saying there is no more information about something

1 and that is needed, please take care of that. Because I don't
2 know whether that was with the Coalition or that was with
3 Curling folks or -- but there was one -- at least one or two
4 spots where people said we have no more documents. But they
5 hadn't been said -- and that was said only in the -- in the
6 statement to me, not in the actual supplement or --

7 MR. MILLER: Yes. Yeah, Your Honor. This is Carey
8 Miller again.

9 I think what Your Honor may be referring to is the
10 dispute between the State and the Coalition plaintiffs.

11 THE COURT: All right.

12 MR. MILLER: We have separately had some discussions
13 with the Curling plaintiffs and left it at we'll get back to
14 you on revised responses. And that is a high priority item at
15 this point. But we just wanted to --

16 THE COURT: That's fine. I regret that Ms. Price is
17 ill. It doesn't seem like you can take her deposition until
18 she is better, whatever the illness is. But I don't think any
19 misrepresentation is being made. So -- but you will get to
20 take it.

21 MR. MILLER: Your Honor, this is Carey Miller again.
22 We certainly don't think any misrepresentations were being made
23 there.

24 We raised it not so much as a dispute, per se. But
25 we viewed the Court's order as essentially saying give me your

1 checklist of what you need to wrap up discovery.

2 And the one issue there, Your Honor, is that without
3 her deposition I don't know how we -- how the State can move
4 for summary judgment, assuming she remains a plaintiff in the
5 case.

6 MR. CROSS: Yes, Your Honor. This is David Cross.
7 That is not an issue that is going to arise. We understand --
8 we discussed that with them. We understand the concern. So
9 she will be deposed later this month or next month.

10 THE COURT: Okay. All right.

11 MR. MILLER: Your Honor, to be clear, I didn't mean
12 to imply that Curling plaintiffs were obfuscating about it.
13 Frankly, I'm a concerned a bit on the scheduling issues. I
14 don't have the full scheduling order in front of me right now
15 to actually move forward.

16 THE COURT: All right. Let's talk about the
17 Coalition.

18 Is there -- I know what -- anyway, as to the
19 Secretary of State, I'm not -- I would have to be persuaded to
20 allow the Secretary of State to be deposed. And I would go
21 through the same type of analysis Judge Jones has provided.
22 And I don't have that information available.

23 So you don't even have that. No one has it available
24 because we don't know what these other people are going to say.
25 So I'm completely deferring that because I'm not -- that is

1 going to be the very last item. And I'm not telling you I will
2 let it happen without being -- it looked like lots of people
3 were involved and not only the Secretary of State. He has a
4 lot going on. So --

5 MR. ICHTER: Your Honor, this is Cary Ichter. That
6 is what we would have proposed.

7 THE COURT: So on -- as to the Coalition plaintiffs,
8 let's just deal -- continue to deal with the State's and the
9 Coalition's conflict rather than the Fulton County ones.

10 Is there -- there is something the Coalition
11 plaintiffs listed that they were concerned they were going to
12 be excluded from the Curling -- from the 30(b) (6) depositions.

13 And is that a real issue, or is that just an anxiety?

14 MR. ICHTER: Your Honor, this is Cary Ichter. I
15 would say it is an anxiety until they actually try to do it.
16 But it was initially noticed, as I recall, in June, I believe,
17 as a joint deposition.

18 And then there were subsequent -- as I understand it,
19 there were subsequent communications between Curling counsel
20 and the State about the scheduling of the depositions. And to
21 a certain extent, we were not included in those. But
22 nonetheless it was about scheduling a jointly noticed
23 deposition, and we fully expected to participate in it.

24 Then more recently, we sought to amend the notice of
25 deposition by including topics that from our perspective were

1 intended to drill down on the original topics and provide more
2 detail concerning what we were looking for. We had understood
3 that in connection with 30(b) (6) depositions that were taken of
4 certain Fulton County witnesses that the preparation left
5 something to be desired.

6 And it was our thinking that if we were to provide
7 greater detail with respect to what we were looking for it
8 would better enable the State to prepare the witnesses so that
9 they could address the specific subjects we were interested in
10 and we would not have those subjects and this could be handled
11 more efficiently.

12 Instead, it appears as though the State interpreted
13 that as being a separate notice of deposition, which it was
14 never intended to be, but rather an amendment to the original
15 joint notice. And we still think that it is a joint notice.

16 And to the extent that the topics are different, we
17 interpret that as being an effort to be more specific and
18 precise about what we're looking for. So that is our position.

19 MR. MILLER: Your Honor --

20 MR. ICHTER: Whenever the deposition goes forward, we
21 want to participate and we want to be able to inquire about our
22 subjects.

23 MR. MILLER: Your Honor, this is Carey Miller. I
24 regret that I have to correct the record on this. We have had
25 extensive communications negotiating these topics, scheduling

1 dates, all of which to my knowledge the Coalition plaintiffs
2 have been copied on throughout.

3 As I recall, we actually had a scheduling or
4 conferral call that Ms. Marks actually attended. We have been
5 motoring along either assuming that the Coalition plaintiffs
6 weren't interested in taking a 30(b)(6) or that they thought
7 they were going to get everything they needed out of the
8 Curling topics or fall in line with it.

9 But this joint notice was served back last summer.
10 And since then, we have had very, very, very extensive
11 communications and negotiations over the topics. We have not
12 heard a peep from the Coalition plaintiffs on the topic, even
13 while we were trying to schedule their 30(b)(6).

14 Your Honor, to serve this at the last second of
15 discovery without so much as a phone call regarding it, it is
16 just astounding. And the State defendants strenuously object
17 to providing witnesses for a second 30(b)(6) deposition in a
18 case where numerous depositions have already been taken.

19 And to my recollection, I'm not sure the Coalition
20 plaintiffs have taken a deposition so far. The ones that I
21 have been involved in, they have had a plaintiff representative
22 there, who is not counsel propounding questions during the
23 depositions.

24 And I just -- I am frankly a little flabbergasted.
25 And so, Your Honor, for those reasons, we do not -- we

1 strenuously object to adding these additional topics into the
2 already scheduled 30(b)(6) dates. I would suspect that the
3 Curling plaintiffs would strenuously object to us delaying the
4 30(b)(6) date for this last minute change of plans. And we --
5 the State asked that an order of the Court overruling our
6 objection will not be providing witnesses on additional topics
7 on a separate date that were noticed at the very last minute of
8 discovery that frankly I assumed the 30(b)(6) deposition would
9 be the top priority they were seeking throughout discovery.

10 THE COURT: So the --

11 MR. ICHTER: Your Honor, may I address that? Cary
12 Ichter.

13 THE COURT: Just one second. So what we're talking
14 about, just to make it clear on the record, is the -- the
15 Coalition provided an amended notice of 30(b)(6) topics on
16 June -- on January 24th, 2022, in Document 1271-2.

17 Is there anything else we are referring to in terms
18 of an amended notice?

19 MR. ICHTER: No.

20 THE COURT: All right. All right. Go ahead. And
21 identify yourself when you are responding.

22 MR. ICHTER: This is Cary Ichter, Your Honor.

23 First of all, I'm not exactly sure what we are
24 disagreeing about here. Mr. Miller indicates that we have been
25 copied on all of these communications.

1 All I was saying was I was understanding that there
2 were communications also that we weren't copied on. But to the
3 extent that we were copied on all of them, I think that is
4 consistent with what I initially said, which was it was a
5 jointly noticed deposition. And typically speaking, you would
6 do that. You would copy one of the parties who's noticed the
7 deposition.

8 And the amended notice, as I said, did not change the
9 topics but rather attempted to define with great precision
10 exactly what we were looking for under the general umbrella of
11 the initial topics.

12 We don't think that there is anything really new in
13 the topics as they are defined in the amended notice. We are
14 just telling them -- drilling down with respect to what the
15 subjects are.

16 So I don't know why Mr. Miller would be flabbergasted
17 or what the remedy for flabbergast is. But in any event, you
18 know, we are entitled to participate in the notice -- I mean,
19 the deposition that we jointly noticed.

20 As far as this being last minute, you know, the last
21 time I checked, virtually every deposition that is currently
22 being teed up for the past two weeks has been noticed within
23 roughly the same time frame. Half of these depositions are
24 occurring at the last minute.

25 So I'm not sure exactly what is unique about this

1 particular deposition versus the other 14 depositions being
2 taken in the last ten or so days of discovery.

3 MR. MILLER: Your Honor, if I may, what is unique
4 about this is the fact that it is a 30(b) (6) deposition upon
5 which all these additional topics were noticed and in a
6 situation where the Coalition plaintiffs have failed to take
7 discovery through depositions to come in at the last minute and
8 frankly potentially blow up what their co-plaintiffs are trying
9 to proceed that we have agreed upon.

10 THE COURT: Let me just ask you this. I can't easily
11 identify right now what it is amending. So I can see the
12 topics.

13 Do we have something -- can you refer me to a
14 document that has the original version?

15 MR. MILLER: Your Honor, the original joint notice of
16 deposition is at 1276-2, I think is what --

17 THE COURT: Because this is 1271-2. So it is at --
18 all right.

19 MR. MILLER: 1276-2.

20 THE COURT: So 1276-2.

21 MR. CROSS: Your Honor, this is David Cross. I think
22 there may be an easy fix.

23 Could I suggest something?

24 THE COURT: Yes.

25 MR. CROSS: So the depositions are scheduled --

1 right? -- for tomorrow with Chris Harvey and the other three
2 next week as 30(b)(6)s.

3 As I understand Cary Ichter, he is saying these are
4 subtopics within the topics that Vincent and I negotiated
5 before.

6 Why don't -- it doesn't sound like Carey is saying
7 they are not going to allow the Coalition to ask questions in
8 the deposition. And we're prepared to split the time with the
9 Coalition.

10 Why don't we all just go forward with the depositions
11 as scheduled? They will prepare the witnesses on the topics
12 that Vincent and I negotiated, which as I understand from Cary
13 Ichter captures their subtopics, just more precisely. And if
14 something is -- if there is a gap when those depositions are
15 done, then the parties can confer and work that out or come
16 back to you.

17 But it doesn't sound like this is something Your
18 Honor needs to wade into, unless I have got any of the facts
19 wrong.

20 Cary and Carey should correct me.

21 MR. MILLER: Your Honor, this is Carey Miller. And I
22 disagree with Mr. Ichter's description of the topics being
23 consumed within the original notice. The originally noticed
24 30(b)(6) is moving forward.

25 It is illogical and unproductive for the Coalition

1 plaintiffs at the last minute to come in and try and blow
2 things up with entirely new topics. And what I fear, Your
3 Honor, is that we're going to get into these depositions and
4 we're going to be told that our clients are not prepared to
5 address the issues -- our 30(b) (6) representatives because we
6 have had at this point a little under a week to look at it.

7 We have been preparing on the topics noticed by the
8 Curling plaintiffs for several weeks, if not months, now. And
9 it just -- Your Honor, that is -- I believe Your Honor --

10 THE COURT: All right. I've got it. I've got it.

11 I think that Mr. Cross' proposal though is
12 reasonable. And it seems to me that there are questions that
13 obviously will be follow-up questions from the ones that were
14 negotiated with Mr. Russo.

15 But if something is completely not -- isn't
16 reasonably within the rubric of it, then it is just going to
17 have to be reserved and the Coalition will have to bring that
18 to my attention.

19 That is why -- I don't know -- I can't even -- I
20 can't in the time I have here compare the Coalition's amendment
21 to 1276-2 with the degree of refinement that would be necessary
22 for me to see what exactly is different. I think that I see
23 one that is very different. But I'm not sure that it is a
24 reasonable outgrowth of what was negotiated as something
25 either.

1 MR. MILLER: Your Honor, if I may offer this. If the
2 Coalition plaintiffs want to participate in the 30(b) (6) on the
3 topics that were noticed by the Curling plaintiffs, the State
4 will not have an objection to that.

5 I recognize Your Honor has been swamped with a load
6 of filings right now. And I certainly understand that there is
7 not exactly a compare and contrast between the two notices.

8 But if we proceed under the understanding that the
9 Coalition plaintiffs' additional -- 30 additional topics and
10 subtopics are contained within the Curling plaintiffs probably
11 equally as large topics and subtopics but then we have been
12 negotiating on, I fear we will be seeing you on another
13 conference call very quickly.

14 THE COURT: Well, I'm not looking for each of them to
15 be asked. I'm looking for reasonable follow-up that is just --
16 that is -- there are ones here I can see that are distinctly
17 different. But there are other ones that seem like just
18 regular follow-up questions.

19 And I think that is something, frankly, that
20 Mr. Ichter and Mr. Cross need to talk about how they want to
21 accommodate this and not have this deposition -- these
22 depositions blow up.

23 MR. ICHTER: Your Honor, this is Cary Ichter. We
24 agree with Mr. Cross' suggestion. We think it is sensible, and
25 we are prepared to proceed in that manner.

1 THE COURT: All right. Very good. I'm going to
2 consider this resolved then.

3 Then I know that the State was concerned that the
4 Coalition -- about the Coalition not having provided some
5 documents.

6 Was that a priority on the State's part? I know that
7 the -- because I'm looking at -- almost all of the Coalition's
8 issues are relating to the Fulton County -- other issues.

9 MR. MILLER: Yes, Your Honor. The -- this is Carey
10 Miller. I just received an email from Mr. Brown letting us
11 know that they do intend to produce some documents in fairly
12 short order.

13 But separate from the documents that -- where either
14 essentially the objection was withdrawn in the course of the
15 discovery dispute filing, there also remains before you the
16 discovery dispute, which is in multiple different filings. And
17 we apologize to Your Honor for that. But it is at Docs. 1245,
18 1257, and 1265.

19 And, Your Honor, a lot of these are items that we
20 have raised before, particularly with respect to the
21 individuals that the Coalition plaintiffs intend to rely upon
22 for their associational standing.

23 And what concerns me, Your Honor, is that -- Your
24 Honor has seen the State's position about not wanting to extend
25 discovery. But I do fear that we're going to have no choice

1 because I presume that the Coalition plaintiffs are going to
2 have numerous individuals that they intend to rely on for
3 associational standing.

4 THE COURT: I thought they had identified just one.

5 MR. MILLER: I'm sorry, Your Honor?

6 THE COURT: I had the sort of recollection they had
7 only identified one. But that is --

8 MR. MILLER: Your Honor, I think that was a response
9 to an interrogatory actually. I'm trying to jog my memory
10 right now. I know we discussed it at the November hearing.

11 But it was essentially name the dates which the
12 membership began. And we got back that Megan Missett is a
13 member who joined by oral agreement in 2017.

14 If that is all the Coalition plaintiffs are relying
15 on for their associational standing, we will move forward.

16 THE COURT: Is that, in fact? Because that is who I
17 remember. Because she was the plaintiff in another case. That
18 is why I could remember her name.

19 MR. BROWN: Your Honor, this is Bruce Brown.

20 THE COURT: Yes.

21 MR. BROWN: This particular issue relates to
22 Interrogatory Number 12. It is addressed in our Document 1257
23 and their dispute 1245.

24 We have agreed to give a list of members upon whom we
25 base associational standing. They originally wanted

1 comprehensive membership lists, and we objected. And we worked
2 out that, okay, if you just want to know the numbers who we are
3 relying upon, we will give you that list.

4 We will give that list. We haven't done so yet. We
5 need to do so. I completely agree. And we will follow-up our
6 interrogatory responses by February 2nd. And we will verify
7 those.

8 And to the extent that requires additional discovery,
9 which I doubt -- but if it does, we will stipulate that that
10 would be reasonable for the State to do so.

11 THE COURT: Does that address the State's concern?

12 MR. MILLER: That addresses the State's concern with
13 respect to that interrogatory.

14 THE COURT: Right. I understand there are others.
15 But I just wanted to make sure it does as to that.

16 And then there was Request Number 2. The State was
17 seeking documents showing the total number of contributors and
18 total number of contributions received as a result of fund
19 raising efforts concerning this litigation.

20 And as I understand, the Coalition now is maintaining
21 that there are not documents that basically identify that,
22 contributions earmarked specifically for litigation versus
23 general other efforts.

24 So you want them to amend their answer to be -- to be
25 clear about that? I think that they did. But maybe they

1 didn't. And this is only in the going back and forth.

2 MR. MILLER: Well, truth be told, Your Honor, this is
3 an issue where we had written to the Coalition plaintiffs back
4 in early December and never got a response, which is why you
5 got the filing in multiple pages.

6 With respect to Request Number 2, the way I read
7 Coalition plaintiffs' response is that they have no responsive
8 documents considering a narrow reading of the request. Your
9 Honor, the State framed this request so that we would not
10 unduly burden the Coalition plaintiffs' members. We
11 specifically didn't ask for the names of contributors, when
12 they gave, who gave what amounts.

13 We're trying to get the information that we need for
14 the case without unduly burdening the Coalition members. And
15 it is -- I regret to some extent not framing it like the
16 interrogatory that we always intended to draw back because this
17 is the fear that I have trying to be --

18 THE COURT: Let me ask this: Were there
19 solicitations that the Coalition made for support that
20 mentioned litigation, and was there any requirement that people
21 differentiate litigation from just simply support of the
22 organization's mission?

23 MR. BROWN: This is Bruce Brown, Your Honor. The
24 answer to that is no, that is not the way that the funds come
25 in. They are not earmarked as such.

1 Our -- the frustration they have is that they are
2 trying to prove a point that they are never going to prove
3 because there is no evidence of contributions received by CGG
4 as a result of fund raising efforts concerning the litigation.

5 We're not saying necessarily -- we're not only saying
6 that that is not a reasonable request. We're saying that even
7 if it were, as a practical matter, we don't have any documents
8 to produce.

9 Moreover -- and to take the approach that the Court
10 has taken with respect to a number of these other disputes, Ms.
11 Marks will be deposed. And that is the best way for this
12 particular issue to be run to ground will be in the deposition.

13 And if there is any aftermath to that where there are
14 documents that are (unintelligible) that would give the State
15 more guidance on this issue, then that can be explored at that
16 time.

17 THE COURT: All right. Well, I'm willing to do that.
18 But then Ms. Marks has to be prepared to address the way she
19 does fund raising, what was -- how people know that they are --
20 what is being solicited.

21 I mean, it would be normal for all of the range of
22 activities of the organization to be identified for people when
23 they are raising funds. And maybe they just simply get all the
24 money contributed and all the letters. I mean, they can't --
25 if it can't be segregated, it can't be segregated.

1 MR. BROWN: Your Honor, she will be fully -- she will
2 be fully knowledgeable of the answers to those questions.

3 THE COURT: All right. And then if something comes
4 up that requires a follow-up, you know, hour deposition, then
5 that will happen. That is what it is.

6 MR. BROWN: Absolutely, Your Honor. Absolutely.

7 THE COURT: All right.

8 MR. MILLER: Your Honor, I'm sorry. This is Carey
9 Miller. The State is fine with proceeding like that as to
10 Request Number 2.

11 We would, however, ask that an amended response be
12 provided because to get a response saying that there are no
13 responsive documents which was not the initial response to the
14 discovery request it is --

15 THE COURT: I think you are due the amended response,
16 and it needs to be verified. And --

17 MR. BROWN: Of course, Your Honor.

18 THE COURT: And it needs to be provided before Ms.
19 Marks' deposition.

20 MR. BROWN: Okay, Your Honor. We'll produce that.

21 THE COURT: Then there is this other question --
22 Request Number 3 seeks communication between the Coalition
23 plaintiffs and individuals pursuing similar claims, Lin Wood,
24 Sidney Powell, et cetera, I gather.

25 I don't understand exactly what your theory of

1 relevance is here on this, Mr. Miller. So I'm a little
2 confused. I could understand perhaps because Mr. Favorito used
3 to be involved with the Coalition -- that one. But I don't
4 understand why we would be extending this to Lin Wood, Sidney
5 Powell, and any other similarly situated people.

6 MR. MILLER: Yes, Your Honor. I can address that.

7 Your Honor obviously picked up that with respect to
8 Mr. Favorito. I would also point out that, as we pointed out
9 in our initial filing, we have got some responsive
10 communications to this request. We suspect there are a lot
11 more.

12 And with respect to the relevance aspect,
13 respectfully, Your Honor, I believe that the Coalition
14 plaintiffs have the cart ahead of the horse here asking us to
15 argue as to admissibility of the relevance.

16 Your Honor, Ms. Greenhalgh was previously the vice
17 president for the National Election Defense Coalition. She has
18 filed multiple of these suits. She held a conference and panel
19 with plaintiffs' experts in this case. I think all of them,
20 off the top of my head. I know at least Dr. Halderman was
21 there. And I believe Mr. Skoglund was there as well.

22 Communications about that conference which were
23 related to the litigation both here and in North Carolina and
24 in other states are certainly relevant and very well could lead
25 to admissible evidence that could either go to impeachment and

1 most likely toward impeachment or substantive evidence that
2 goes to essentially these are the same generalized grievances
3 and policy positions that the State has maintained all along
4 are reasonable policy positions that are not constitutional
5 claims.

6 And, Your Honor, we attempted to limit these to
7 specifically identified individuals only concerning the
8 litigation. And, Your Honor, I am at a bit of a loss as to how
9 the relevance and the context of the discovery, which simply
10 has to bear on or reasonably could lead to another matter that
11 could bear on an issue that is or may be in the case. That is
12 the Eleventh Circuit precedence.

13 MR. BROWN: Your Honor, we're not at a loss as to the
14 irrelevance of this or the lack of discoverability. The
15 State's position -- and we have fought this and fought this
16 throughout this entire case.

17 If it says something about this litigation or about
18 DREs or about BMDs, therefore it is relevant. That is not the
19 test. The test is whether it is related to a fact that is of
20 consequence in determining the action.

21 And all we hear in response to the State are it
22 mentions this litigation. They never go on to explain how that
23 evidence will ever be used.

24 Second, what Mr. Miller is reciting is information
25 that he already has. He is talking about information that he

1 has right in front of us about the statements. Here are these
2 statements. Then he doesn't need it from us.

3 And the idea that -- and he is -- I mean, I have had
4 this fight before. But he is misreading Rule 26. And he
5 doesn't explain how that evidence is going to lead to
6 something.

7 That is not what the rule says. The rule says it has
8 to be relevant. It has to relate to some claim or defense.
9 And you did not hear in Mr. Miller's response any claim or
10 defense that that evidence would relate to. And --

11 MR. MILLER: Your Honor --

12 MR. BROWN: And in terms of trying to limit discovery
13 and get this stuff done, which we understand and agree with
14 Your Honor's position, this has got to stop. I mean, it is the
15 same for the defendants and the same for the plaintiffs. At
16 some point, we have to stop this endless drumbeat and discovery
17 on our communications with Lin Wood, seriously.

18 If they find the communications between us and Lin
19 Wood, which is vanishingly unlikely, how is that going to be
20 used in this lawsuit? And if that is discoverable, what is
21 next?

22 So we just -- our position is we draw the line here.
23 It is just not discoverable.

24 THE COURT: All right. So you have provided
25 information on the communications with Ms. Greenhalgh?

1 MR. MILLER: No, Your Honor. This is Carey Miller.
2 The documents that are referenced in that discovery dispute
3 filing were produced by the Curling plaintiffs, not by the
4 Coalition plaintiffs.

5 MR. BROWN: Ms. Greenhalgh is a consulting expert,
6 not a testifying expert, to CGG. And the idea that -- this is
7 an endless -- this is a (unintelligible) of relevancy that the
8 State wants to suck us all into. That is, if we have a general
9 grievance, therefore we don't have standing, therefore if
10 anybody else in the country has the same grievance, that proves
11 that we don't have standing.

12 Now, that should show just how ridiculous their
13 standing argument is. But also it is a limitless test of
14 discovery, and it will never get done.

15 MR. MILLER: Your Honor, I respectfully disagree with
16 Mr. Brown. We have had reasonable discussions on a lot of
17 these things. I don't want the Court to think that we're just
18 trying to volley things back and forth just because.

19 We only recently understood when we requested a
20 deposition date from Ms. Greenhalgh -- because we weren't
21 entirely sure if she was a testifying -- or was going to be
22 providing a supplemental report.

23 The only reason we fully understood that
24 Ms. Greenhalgh was a consulting expert -- we knew that Your
25 Honor had ordered her be permitted to view attorneys' eyes only

1 material. And what we found out shortly thereafter is that,
2 respectfully, she carried about a campaign to argue this case
3 elsewhere, rather than just before this Court. Her own entity
4 has been dealing with the same claims.

5 And to Mr. Brown's point about relevance, Your Honor,
6 I cannot argue admissibility of evidence under Federal Rule of
7 Evidence 401 because I don't know what the document is. The
8 only thing that you can argue at this point with respect to a
9 discovery request is if the request reasonably bears on matters
10 in the case.

11 And in this instance, the prime example of this is
12 with respect to frankly -- not so much the report of
13 Dr. Halderman but with respect to his participation in this
14 conference with respect to the coordination with the National
15 Election Defense Coalition, which has filed an amicus brief in
16 this case.

17 All that may not be there. I don't know. And that
18 is why the discovery rules are set up like they are, to simply
19 be reasonably calculated.

20 THE COURT: All right.

21 MR. MILLER: Your Honor, with respect to the entire
22 list, we will withdraw our request as to each individual, other
23 than Mr. Favorito and Ms. Greenhalgh.

24 And to the extent the communications with
25 Ms. Greenhalgh are privileged as a consulting expert, the

1 Coalition plaintiffs can put that on a privilege log, which as
2 we noted for another dispute we still have not received.

3 THE COURT: I think that is a reasonable resolution,
4 and I agree with that.

5 MR. BROWN: Favorito has not been a member -- I don't
6 have the exact dates. But he has not been a member of the
7 Coalition for quite some time.

8 THE COURT: Well, you provide communications up to
9 the point that he was a member. But if Mr. Favorito -- let me
10 just say as a matter of -- if he -- he was obviously actively
11 both litigating, speaking on these issues -- and I can't
12 remember the last time he was appearing on the -- as a header
13 in any of these things.

14 But whatever -- as long as he was involved, it
15 certainly is realistic to have him -- the communications to be
16 made available.

17 MR. MILLER: Your Honor, that is agreeable to us. I
18 do want to raise that -- I understood the same thing as
19 Mr. Brown said is that Mr. Favorito has not been a member for
20 quite some time.

21 And I just wanted to clarify I wasn't sure if the
22 Court was saying communications up to the point Mr. Favorito
23 ceased becoming a member. Because the documents that we do
24 have and that we do know about show that Mr. Favorito was
25 discussing actions and policy positions with the board of

1 Verified Voting, that he was frankly discussing litigation
2 strategy and the importance of certain wins in the litigation
3 in documents that have been produced from the Curling
4 plaintiffs.

5 And so that is the only aspect I would raise, Your
6 Honor, is that I respectfully don't --

7 THE COURT: I don't know what the board of Verified
8 Voting is.

9 Is that Ms. -- is that Ms. Price or Ms. Curling's
10 organization?

11 MR. MILLER: Yes, Your Honor. That's correct.

12 And Mr. Favorito has his own separate organization,
13 Voter GA.

14 THE COURT: But you are making this request of -- I
15 mean, those two individuals we just identified are not part of
16 the Coalition. So that is why I'm -- they are --

17 MR. MILLER: I understand, Your Honor.

18 THE COURT: So I don't know why that would be sent to
19 the Coalition then.

20 MR. MILLER: I understand, Your Honor.

21 I'll answer that question. First of all, we sent
22 these same discovery responses to both sets of plaintiffs.
23 But, second, those documents I was referring to also include
24 the executive director of CGG on the same documents. So it is
25 not -- there is a little bit of overlap.

1 THE COURT: I don't know. I mean, he is a -- clearly
2 a long-term activist in this regard. And you can subpoena him
3 for a deposition and get what you need from him. I mean, I
4 just think it is sort of getting far afield, it seems to me.

5 It is one thing what you are -- it says about
6 Ms. Greenhalgh. And we're going to protect the documents to
7 the extent they are part of his -- her conferring with counsel
8 in her consulting role.

9 I don't know that it makes any difference that
10 Mr. Favorito is still pursuing the same issues as always and
11 has talked to these other people. It seems marginal to me.
12 But you take his deposition, and I don't know that I -- and you
13 can subpoena any -- he may have very organized files.

14 But I think let's focus on the -- that he should have
15 them then. And if there is something you want from when he was
16 a member of CGG, if he has had a role in that in the last few
17 years, which he may or may not, then that should be produced.

18 But other than that, I'm not going -- we're not going
19 to chase this around.

20 MR. BROWN: Thank you, Your Honor.

21 MR. MILLER: Okay. Thank you, Your Honor.

22 THE COURT: Okay. They were seeking communications
23 between the Coalition plaintiffs and anyone else except expert
24 witnesses relating to Dr. Halderman's report.

25 I'm not sure -- I mean, I'm not sure why that is

1 leading to relevant evidence. I mean, I'm not talking about
2 admissibility. But why is it --

3 All right. So Joe Blow, who is concerned about
4 something, writes to the Coalition, can you tell me about
5 Dr. Halderman's report? Why does that matter?

6 MR. MILLER: Your Honor, I would rate that in two
7 contexts.

8 First of all, take Mr. Favorito for an example. And
9 I don't want to single him out. I know he is not -- I don't
10 suspect he is here right now. But somebody was actively
11 involved in this litigation who has commented before, various
12 other filings and pleadings, who has previously discussed the
13 litigation strategy with the plaintiffs. There may well be
14 communications there that say, look, I don't (electronic
15 interference). It may not be the case.

16 But secondarily, Your Honor, frankly the main reason
17 we pressed this issue it may be (electronic interference) is
18 with respect to --

19 THE COURT: Wait a second. We've got two people
20 talking. And whenever we do, we can't hear.

21 MR. MILLER: I'm not sure where that is coming from.

22 THE COURT: All right. The main reason that you have
23 pursued this is? That is where you left off.

24 MR. MILLER: Your Honor, it is related to what we
25 state in Request Number 4. As I recall -- and I don't have the

1 requests and responses in front of me. I only have the filings
2 in front of me.

3 But there is also a privilege claim made here, and we
4 have yet to get a privilege log from the Coalition for Good
5 Governance. The State has produced a privilege log, which is
6 not the Fortalice privilege log that Your Honor has. And we
7 have engaged with good faith discussion on questions that had
8 arisen from the Curling plaintiffs.

9 THE COURT: All right. Well, I gather the Coalition
10 plaintiffs have dropped their relevance objection to the
11 time -- important and time-sensitive issue that was in Request
12 Number 4 and will produce non-privileged information --
13 response to the request to the extent they have any. I don't
14 know what that is.

15 MR. BROWN: Yes. Yes, Your Honor. We have one
16 document in response to Request Number 4 that we will produce.

17 And Request Number 5 -- it may have been the audio.
18 This has to do with communications from the Coalition
19 plaintiffs and anybody else relating to Dr. Halderman's report.

20 I did not understand or maybe I just didn't hear
21 Mr. Miller's explanation for why that is relevant and
22 discoverable, I should say.

23 THE COURT: That is what was getting blocked.

24 So how is that --

25 MR. MILLER: Your Honor, Request Number 5 relates to

1 the extent that there is communication between -- again, this
2 is where I use the example of Mr. Favorito. I don't
3 necessarily want to pick on him on a conference call.

4 But to the extent -- we already know he's had these
5 discussions about litigation strategy. And if he is -- he may
6 well send an email to Ms. Marks or an agent of the Coalition
7 and say, hey, I don't think this makes a lot of sense.

8 I don't know if that is the case or not. But --

9 THE COURT: But if he is not a member of the
10 organization, why does it matter that somebody who is not a
11 member of the organization or not in the leadership of the
12 organization says I think this doesn't make sense?

13 I mean, I just don't know why that leads you
14 anywhere -- leads to relevant evidence.

15 MR. MILLER: I understand, Your Honor. And we're
16 willing to withdraw this request if we're resolving a lot of
17 the others here.

18 The fact of the matter is it was really more in the
19 sense of if the individuals who were believers in this cause,
20 you know, may have impeachable evidence as to something that
21 they disagree with, I believe that is valuable evidence in
22 terms of persuasion.

23 But, Your Honor, as I mentioned, we'll withdraw this
24 question. So we appreciate the Court's attention.

25 THE COURT: All right. Good.

1 Then there is a lot of concerns about -- I guess in 6
2 and 11 for the State seeking documents reflecting -- what
3 declarants or fact witnesses CGG intends to rely upon including
4 at summary judgment. And basically I think there was something
5 comparable for this actually also for the -- as to the Curling
6 plaintiffs' responses and -- except that was, I thought,
7 please -- I thought that was closer to identify anyone who you
8 might be relying on as a witness, not all their statements.

9 And it is one thing to ask tell me who your witnesses
10 will be. And they may not know all of the witnesses, and it
11 may be -- have to be amended multiple times.

12 But to the extent they know, I think that is
13 realistic and it should be identified. Because, you know, I
14 mean, that is 101 of litigation. If you know you have a
15 witness that might be somebody you might call or might be --
16 somebody else wants to interview, you have to identify them.

17 MR. BROWN: Your Honor, this is Mr. Brown. Typically
18 the way it is done, as you suggested, is that the parties ask
19 the other side state every person who has knowledge of this,
20 who has knowledge of this, or who has knowledge of this, which
21 is totally acceptable. That has been done. And I think there
22 are lists all over the place with respect to that.

23 This is a -- Question Number 6 is a disguised
24 interrogatory. I guess they ran out of numbers. Maybe they
25 didn't. But they want documents reflecting communications

1 between the Coalition plaintiffs and all of those people.

2 And, you know, we don't know who we're going to rely
3 on at trial yet. We have -- we have -- there are multiple
4 answers to interrogatories in which the Coalition has
5 identified persons with knowledge.

6 And I don't see what more is necessary. There will
7 be a time when the parties are required to exchange, you
8 know -- we're not trying to hide anything. It is just --

9 THE COURT: Well, if there are people you think have
10 knowledge and they have asked you a witness interrogatory, I'm
11 expecting everyone to be clear. You might not put that on your
12 list. They can go and try to reach the people.

13 But, you know, it is just sort of like going back to
14 a typical personal injury case. If you don't identify all the
15 people you know of who are witnesses at the scene of the
16 accident, then you can't suddenly put them -- have a -- be in
17 the position that you are identifying them as a central witness
18 in the summary judgment motion or at trial without having
19 identified them if you knew.

20 MR. BROWN: Yes, Your Honor. In terms of -- I
21 understand that you can't put a witness up that you haven't
22 identified in response to an interrogatory that asked that
23 question. And we did that.

24 Interrogatory Number 11 asks for fact witnesses upon
25 which you rely at summary judgment. Two things about that.

1 One, we don't have a motion for summary judgment now. I
2 believe that the defendants are saying today that their summary
3 judgment motion will be limited to standing. And I would think
4 that makes sense since Your Honor has already found that there
5 is a likelihood of success on the merits of many of these
6 issues, which for sure I would overtake a motion for summary
7 judgment.

8 If it is limited to standing, then we will provide
9 fact witnesses who we rely upon at summary judgment on the
10 issues. And we will give that to them. They already have
11 these names. There may be another name in terms of what we
12 talked about before in terms of associational standing. The
13 numbers we will answer to that extent.

14 We don't know if they are going to raise, you know, a
15 motion -- in their summary judgment motion they are going to
16 get into, you know, what other -- that they are going to
17 raise --

18 THE COURT: I understand that. I'm just saying you
19 identify -- I'm expecting you to -- both -- everybody to
20 identify the witnesses they know who might conceivably be
21 witnesses who have knowledge, as long as -- relevant knowledge,
22 even if you don't end up calling them as witnesses.

23 MR. BROWN: Yes, Your Honor.

24 THE COURT: I do want to clarify something. It is
25 true back with the DREs I thought there was some -- there was a

1 likelihood of success, and I indicated that.

2 We are dealing with something else. What I said in
3 the most recent order -- and I know you have repeated it in
4 this way -- is these are very serious issues and of real
5 concern and weren't just simply made-up issues. But I don't
6 think I've made a finding of likelihood of success.

7 It is just sort of -- it has over time been
8 characterized in different ways. Let me say that. But I don't
9 think I have made the same findings. So --

10 MR. BROWN: Thank you, Your Honor. I understand. I
11 didn't mean to --

12 THE COURT: That's all right. That's all right. I
13 just didn't want -- I didn't feel like I could let it go by.

14 MR. MILLER: Your Honor, I do just want to make clear
15 to the Court -- this is Carey Miller -- that we will not be
16 moving for summary judgment limited purely to standing issues.

17 I think Mr. Brown misconstrued my point earlier. But
18 I didn't want the Court to be led to a sense otherwise because
19 we understood this to have moved beyond that.

20 And the last thing I will say with the request and
21 interrogatory, I believe Your Honor's resolution there is
22 reasonable. And this is modeled after the exact same process
23 that we did in Fair Fight where the Fair Fight plaintiffs were
24 alleging a diversion of resources wherein they are spending
25 resources to essentially prevent a burden that is imposed on

1 others.

2 And, you know, truthfully if we could just get
3 limited to -- as far as all these declarations that are filed
4 in the hundreds of pages of notices of filings which ones they
5 intend to rely on and which ones are just old news.

6 MR. BROWN: That goes way beyond what -- I don't know
7 what old news means. We will get --

8 THE COURT: You will get a list together. All right.
9 Get a list together. And the Curling people should as well.

10 I'm a little bit -- I think we have taken care of
11 this topic, unless somebody else says something else about
12 this.

13 I'm going to tell you what I thought were the
14 remaining major topics. But you can obviously correct me.
15 There is the issue of the -- I thought the so-called
16 supplemental depositions or experts. And maybe that is not a
17 big issue at this juncture. But that the Coalition wants to --
18 is offering and which State defendants say this is not really
19 supplemental -- what has happened is sort of an end run, as I
20 understand what they are arguing.

21 And then the Coalition has all these issues relating
22 to Fulton County that -- and the reason why I have held that to
23 the back is just to make sure that we deal with everything
24 relating to the State first.

25 MR. MILLER: Your Honor, on behalf of the State, we

1 do believe that is a serious issue to the extent we're -- it
2 may obviate the need to take these additional depositions.
3 And, Your Honor, we filed the notice of objection. I believe
4 that actually came before or maybe it was right about the same
5 time Your Honor's order came out to kind of resolve all these
6 discovery disputes.

7 Our simple thought was we want to reserve our rights
8 here. We will move to exclude if that is what the Court
9 prefers. But the reality is that Dr. Stark relied solely on
10 publicly available information that was available at the time
11 his initial report was due.

12 Second, Dr. Buell has nothing to supplement. He
13 filed no new declaration. The last declaration he has is
14 simply related to the -- to the DREs back in 2018. So there is
15 no report to supplement.

16 At least, Dr. Stark initially filed a rebuttal
17 report. But never mind that the issues that he opines on as a
18 matter of supplementation are matters which should have been
19 addressed before, which is just a misuse of Rule 26(e).

20 And we had a back-and-forth with the plaintiff about
21 this when we were working out the proposed scheduling order,
22 which was making sure the State defendants had reserved their
23 rights to challenge any purported supplemental reports.

24 We understood Your Honor simply wanted to move the
25 case along and set a schedule. And that is why we raised at

1 the discovery hearing that we couldn't necessarily say a
2 supplemental report without it being in the abstract. But now
3 that we see it, it is.

4 And, lastly, Your Honor, the opinions of both
5 Dr. Stark and Dr. Buell are essentially we need more discovery.
6 That is not an opinion of an expert that goes to a matter at
7 issue in the case. That is an affidavit to be filed along with
8 a discovery motion saying this is why I need it. It is not a
9 supplemental report because it doesn't opine on anything
10 relevant or helpful. It simply opines on we need more
11 discovery.

12 THE COURT: Mr. Brown, do you want to respond?

13 MR. BROWN: I think Mr. Ichter is going to respond to
14 this one.

15 Cary?

16 MR. ICHTER: Yes. Your Honor, we have tried to set
17 aside pretty much all other business over the course of the
18 past couple of days and give this as much attention as humanly
19 possible.

20 But the extent of what we have been able to do with
21 respect to this particular issue is at least for me to print
22 out the notice of objection from the other side. And given the
23 importance of the issue, Your Honor, we would appreciate an
24 opportunity to study the other side's position and submit some
25 sort of written response to this because we have only had this

1 a short time.

2 I would note that, however, because it is signed, has
3 these depositions noticed and can take depositions both of
4 these gentlemen, learn anything that they want from them in
5 connection with the depositions, in connection with the
6 opinions that they have expressed up to this point.

7 There is no reason why this is a pressing issue at
8 this very moment. And so I don't think it would prejudice
9 anybody to afford us an opportunity to provide a little more
10 fulsome analysis to the Court, the more we can do off-the-cuff.

11 THE COURT: Well, I don't mind giving you a few more
12 days to respond. But I will say it seemed -- the defendants'
13 point seemed to have some legitimacy. I mean, Dr. Stark at
14 trial I guess could certainly testify regarding -- I guess not
15 certainly -- but certainly arguably testify regarding the full
16 affidavit he has provided in the past about -- if all of that
17 came -- if the trial came to pass and it was relevant to be
18 looking at audit methodology and data.

19 But I just -- I think -- I mean, I did print out his
20 affidavit. Excuse me. I unfortunately seem to have left it on
21 the bench when I was in this criminal proceeding before you.
22 But it seemed to me -- oh, I have it here. I'm sorry.

23 Then Dr. Stark in his supplemental starts analyzing
24 what happened with various ballots and the tabulations in
25 his -- in part of his report and in his sort of -- but most of

1 it is relating to his looking at the -- some of the returns and
2 a lot about the audit -- the way the audit was done.

3 It is conceivable that could be tacked on, I guess.
4 But I'm not sure too what he has -- what was filed on the
5 record.

6 I just was surprised of it being filed this late. I
7 mean, it is not -- to the extent it is the other report, I
8 could understand that you would be all ready for it. I mean --
9 I understand that you might not have had all of the ballots
10 before.

11 But I just -- I'm going to have to study this more
12 myself. But I was surprised and concerned because I don't
13 think either of them had been identified as current witnesses.
14 They might have been in the past.

15 And this is -- and -- or at least expressly stated
16 that we are going to use Dr. Buell and Professor Stark anew.
17 And I don't have every single interrogatory answer.

18 So, you know, I think a serious presentation of why I
19 should allow this is appropriate rather than my trying to pull
20 it together at the last moment. But I was concerned.

21 MR. MILLER: Your Honor, this is Carey Miller for the
22 State. And the State can file a formal motion as well. You
23 know, frankly what we didn't want to have happen is we're
24 trying to wrap up discovery and you just see a motion for
25 sanctions come across and --

1 THE COURT: Yeah. And I don't know -- I don't know
2 that we want to do this -- you want to do this as a motion for
3 sanctions. That raises the --

4 MR. MILLER: Discovery sanctions for exclusion.

5 THE COURT: For exclusion. And I think that could be
6 appropriate. But, you know, if the Coalition wants two days to
7 take -- you know, until Monday to look at this and call you and
8 say -- and offer something else, that is fine, before you start
9 working on a motion for exclusion, if they have something.

10 MR. ICHTER: We would prefer that, Your Honor.

11 THE COURT: All right. Well, counsel for the
12 Coalition are then given that until Monday. And then you are
13 directed to communicate with Mr. Miller about this so that you
14 can confirm the way you-all are proceeding with it.

15 If there is a resolution, great. If there is not,
16 that you have -- that you provide a schedule for the motion to
17 exclude, et cetera.

18 MR. ICHTER: We will do so.

19 THE COURT: Okay. Good.

20 Does that -- I mean, I know that there are other --
21 does that take care of the principal issues with the State and
22 the parties? And then we'll go on to Fulton County.

23 MR. CROSS: Your Honor, this is David Cross. I'm
24 going to have to drop soon. So there is one issue I wanted to
25 raise that is particularly time-sensitive.

1 In fact, the Secretary himself just issued a
2 statement minutes ago calling on our expert Dr. Halderman to
3 publicly release the sealed report.

4 And so all the parties agree at this point that at
5 least the redacted version of Dr. Halderman's report should be
6 released. And I would ask Your Honor to revisit that in
7 particular because the Secretary himself has been quite vocal
8 over the last 24 to 48 hours with very personal attacks on
9 Dr. Halderman and on us.

10 I won't get into the substance. Your Honor can read
11 them. But suffice it to say that we're at a point now that as
12 long as this report stays sealed it is incredibly unfair and
13 prejudicial to us and it is hurting Dr. Halderman's
14 professional integrity and it is hurting our professional
15 integrity.

16 And given that the Secretary himself agrees that
17 election workers need to see this and that it should be public,
18 we would ask that Your Honor order that immediately. I don't
19 see a basis to keep it sealed. And all the parties agree that
20 the redacted version should be public.

21 And the personal attacks in the press need to stop.

22 MR. RUSSO: Your Honor, this is Vincent Russo. And I
23 just became aware of this press release that Mr. Cross is
24 referencing.

25 You know, I think that the State -- the protections

1 on the report of Dr. Halderman appear to some degree to have
2 been lost at this point. And I think that is the Secretary's
3 concern.

4 That office has been contacted by reporters who seem
5 to have significant knowledge about the contents of
6 Dr. Halderman's report. Our client has not seen the report
7 still at this time. We were able to produce it to Dominion,
8 which is something we discussed at the hearing the last time.
9 And I do believe that those -- that Dr. Halderman had
10 discussions with Dominion.

11 But at this point, you know, I think the concern is
12 that if the report is not made public it may be doing more harm
13 than good. And it is, you know, unfortunate that we're in this
14 position, quite honestly. Because the State hasn't seen the
15 report, to begin with, and doesn't know what all is in the
16 report and, you know, had concerns about it -- about it --
17 about providing certain access to certain equipment, to begin
18 with.

19 So that is where the State is at at this point -- the
20 Secretary. And, you know, otherwise, we leave it to the
21 Court's discretion, of course, of what to do going forward.

22 MR. CROSS: Your Honor, this is David Cross.

23 Just briefly?

24 THE COURT: Yes.

25 MR. CROSS: I don't understand why Mr. Russo says the

1 State has not seen the report. It has been clear for months
2 that the State is allowed to see the report. We have not
3 designated it confidential. I thought Your Honor was quite
4 clear in our last in-person hearing that the State could and
5 probably should read the report.

6 The reason this is happening now is because Governor
7 Kemp just issued a statement yesterday directing the Secretary
8 to finally take this report seriously and act on it. So I
9 think we all know why we are here.

10 But in any event, the issue for the Court is simply
11 all the parties agree it needs to be publicly disclosed and
12 that serves everyone in a variety of ways. And that should
13 happen quickly.

14 And I certainly also want to make clear for the
15 record there is no one associated with us that has violated the
16 protective order or disclosed anything to the press. I don't
17 think Mr. Russo is suggesting that. But I do want to be clear
18 that Dr. Halderman, my clients, my firm, my colleagues --
19 everyone has been very, very careful about this.

20 THE COURT: Well, it is certainly not what I expected
21 to happen, to be raised as a further political football. But
22 everything does. So I mean, I perhaps shouldn't be surprised.
23 But I'm disappointed that it got raised this way and in a way
24 that only makes things more challenging.

25 And -- but that said, the affidavit report of

1 Dr. Halderman clearly indicated that he understood that some
2 issues and matters, in fact, were -- needed to be confidential
3 and were protected material and that there were -- there was a
4 way that the report could be redacted consistent with
5 professional norms in the tech industry for highly sensitive
6 information.

7 I don't know what he had in mind. But I am not going
8 to release it without seeing what would be proposed as
9 redactions. That is absurd. I mean, we're chasing around -- I
10 mean, it has its own issues. But so does -- and the State has
11 been vigilant about protecting testing of its infrastructure
12 and not releasing information regarding the test results and
13 properly so.

14 We have learned a great deal over the course of the
15 last number of years not just about election technology but
16 with the number of compromises of different data systems that
17 have affected Americans so that, you know, on one hand, we're
18 very concerned about it; on the other hand, we actually have to
19 have a reasonable way of addressing that, which isn't just
20 completely become -- make it a political football.

21 So if you-all agree on this, that is fine. But I
22 need to see a proposed -- a revision of this that would be --
23 or redaction of this that would be one that would be
24 appropriate under the circumstances.

25 MR. CROSS: Your Honor, this is David Cross. We can

1 file that. We provided a redacted version that Dr. Halderman
2 himself redacted I think back in November to the State. My
3 understanding is they didn't have any additional redactions
4 themselves. So we will get that for Your Honor.

5 THE COURT: You don't need to file it. I don't want
6 anyone else saying I want this versus that. I just -- you can
7 go ahead and furnish it to chambers.

8 I'm unhappy with the way it got filed, in the first
9 place. I'm unhappy about the course of now the political
10 treatment of the report and its use in other litigation so that
11 is -- it is out of hand. So I will look at it. And either I
12 will say it is okay or not.

13 And I would urge State's counsel to look at it as
14 well. I don't want to have -- I don't want to have somebody
15 saying we would have released the full report but for Judge
16 Totenberg, that she's hiding something.

17 MR. CROSS: Your Honor -- Your Honor, that actually
18 gets to what I was going to raise, which is -- and I'm glad you
19 gave that admonition. Because part of the challenge that we've
20 had is the Secretary himself on multiple occasions with the
21 press in the last few weeks has said that he and his office
22 have not read it because Your Honor has ordered them not to.

23 And that is just not truthful. It needs to stop. It
24 needs to be clear that his office can read it. Whether they
25 should have read it is a decision for them obviously. But it

1 has been available to them for many months. And they just need
2 to stop saying otherwise in the press.

3 We'll get you a hard copy -- chambers copy, Your
4 Honor, of the redacted version the State has. And we'll go
5 from there.

6 I did also just want to apologize. The reason we
7 filed the report initially was because there was a dispute over
8 who could get access to it, in particular regarding Dominion.
9 So we filed it because we thought the only way Your Honor could
10 rule on that was to see it. And we just filed it under seal in
11 the normal course.

12 Maybe in retrospect we should have just given Your
13 Honor a chambers copy. But we went through the formal filing
14 procedure. But I apologize in retrospect if that was in any
15 way inappropriate.

16 MR. RUSSO: Your Honor, this is Vincent Russo. One
17 just quick clarification.

18 Are we able to share the redacted -- the currently
19 redacted version of the report with our client?

20 We have gone through transcripts and orders in this
21 case to make sure that -- we have been trying to figure out do
22 we have the ability to do that. We saw that, you know, of
23 course, Dominion could see it. And, you know, we think our
24 client should be able -- should be able to see it.

25 And it may be that it was never -- you know, there

1 was never any intention to not allow the -- you know, the
2 employees of the State, of course. Counsel has seen it. But
3 the actual employees of the State to be able to see it or some
4 individuals in that office, if it is restricted to certain
5 people is fine too.

6 But, you know, we just want to make sure that if we
7 can provide it to the Secretary of State's office we would like
8 to be able to do that because we agree that there is -- that
9 that is important.

10 But at the same time, we also don't want to be, you
11 know, accused of violating the protective order and have that
12 come back.

13 THE COURT: Well, I always assumed you were going to
14 basically identify people you want -- that you thought you
15 needed to communicate with it about, whether giving them --
16 whether just simply so we can tell you that you could describe
17 it to them because I don't know that people are going to sit
18 down and read a 95-page report or whatever it is. And,
19 secondly, that if there was somebody you wanted actually to
20 read it, that you would and you would provide appropriate
21 confidentiality.

22 There was some -- it seemed to me -- but it was not
23 my business -- that you didn't seem to want your client -- you
24 didn't want to give it that level of acknowledgment. That was
25 the inference I got from the way it was being handled.

1 But I'm not making any charge about that. I'm just
2 saying that sort of seemed to be it. Because I couldn't -- you
3 know, it seemed to me that the plaintiffs were constantly
4 asking could we meet with Dominion, can we show them, can we
5 deal with this because of their concerns about they wanted to
6 address some issues.

7 And I wasn't -- that really wasn't in my purview to
8 do one way or the other because it was -- Dominion was your
9 contractor and it was up to you and up to the State. And
10 obviously other arrangements could have been made.

11 Now, this is -- it is sort of water over the dam. In
12 terms of the redacted report, because I haven't seen the
13 redacted report, I mean, I certainly -- I can't really address
14 that.

15 I'm going to get it obviously. I will look at it.
16 But if you want to talk with your clients -- your high-level
17 clients about what is in the report right now, go for it. That
18 is fine.

19 But you are certainly allowed to consult with your
20 clients in terms of the redacted -- I would like to see the
21 redacted report. Because they may distribute it to somebody
22 else. So I need to know what is going to be out there.

23 I'm just -- it is a very unhappy circumstance the way
24 this has evolved because I have -- the entire purpose of having
25 hearings in which I did was to maximize transparency but at the

1 same time trying to be mindful of the risks involved of
2 exposure of critical infrastructure, which is what you, the
3 State, wanted as well.

4 So it is -- the State was always very concerned about
5 protecting the confidentiality of its critical infrastructure.
6 Understandably. And so now we have this evolution that is
7 because of frankly the 2020 election obviously but anyway --
8 and the upcoming elections.

9 I don't want to get further into it than that though.
10 So if I can get -- if you have already done the redaction, the
11 Curling plaintiffs, they should send me it. And I gather the
12 State already has it. And I will get back to you by Monday, if
13 not sooner.

14 All right. So I'm going to go briefly -- immediately
15 on -- one last thing. Mr. Russo, I would appreciate your
16 talking with your clients about trying to allow you to work
17 this out in a reasonable way -- all right? -- without lots
18 of --

19 MR. RUSSO: Yes, Your Honor, we will do that.

20 THE COURT: -- a lot more drama in the press about
21 this -- okay? -- as much as I have a high regard for the press.
22 And you know that I do, so -- and the importance of coverage.

23 MR. RUSSO: Yes, ma'am. I will definitely do that,
24 Your Honor.

25 THE COURT: All right. So we're left with all of the

1 variety of things with Fulton County. And can you just wait
2 one moment because I'm going to -- since I'm late to a judge's
3 meeting, I need to let --

4 **(There was a brief pause in the proceedings.)**

5 THE COURT: I don't really understand everything that
6 the Coalition is doing about all these Fulton County documents,
7 frankly.

8 I need to understand a little -- I may have
9 misunderstood when I authorized any discovery. But I don't
10 understand what you are trying to do. So it is hard for me to
11 rule on this without my having any understanding of what the
12 Coalition's objectives are in going through all of these
13 documents.

14 MR. ICHTER: Your Honor, this is Cary Ichter. As you
15 may recall, the Coalition has made numerous attempts since
16 April of last year to obtain a full set of November 2020
17 original recount ballot images and related election project
18 packages. And ultimately an order was entered.

19 We're not dealing with a discovery issue here. We're
20 dealing with an enforcement of a previously entered court order
21 that was --

22 THE COURT: Well, remind me what a project package
23 is. I can't remember at this juncture.

24 MR. ICHTER: A project package is: Ultimately, once
25 the votes are in, a package is put together in what should be a

1 zipped USB file that consists of ballot images, those being the
2 scans of the millions of ballots and the AuditMark for each one
3 of those ballots. So each ballot is like three pages.

4 Supposed to be an AuditMark document that summarizes what the
5 specific inputs by the elector were in filling out the ballot.

6 It also consists of a DVD file for every batch of
7 ballots that is included. And then something that is --

8 THE COURT: What is a DVD? What is a DVD?

9 MR. ICHTER: DVD, the digital media for storing data.

10 THE COURT: Okay.

11 MR. ICHTER: And then something that is akin to claim
12 but something that I understand from the experts that we need,
13 which is the SHA files, S-H-A files, which are authentication
14 files that tell you if the original ballots have been modified
15 in some sort of way.

16 So that is what the election project files consist
17 of. That is what we asked for. That is what the Court's
18 ordered that Fulton County supply to us in its December 3rd
19 order. And those items were required to be produced to us by
20 December the 8th.

21 We received a production of December the 8th. But
22 nearly 18,000 ballot image files were missing from those files.
23 And we communicated with Fulton County and with the Secretary
24 of State's office multiple times with respect to that. In as
25 early as in December we communicated with the Fulton County

1 staff and reported in a meeting that Ms. Marks had with
2 Mr. Lowman and others that the transmitted copies of the
3 packages for both the original and the recount were incomplete.
4 And the Fulton County staff indicated that those packages had
5 been transmitted to the Secretary of State's office in December
6 of 2020.

7 We also followed up, by the way, with Fulton County
8 in an email that I supplied to the Court this afternoon to
9 Ms. Ringer and Mr. Tyson and Mr. Lowman, I believe, in which we
10 described in very specific detail what the history of this
11 entire issue was. And we have communicated a couple of more
12 times in January.

13 When we found out from Fulton County that their
14 position was that all of these files had been turned over to
15 the secure -- to the Secretary of State, we reached out to
16 Mr. Tyson on the subject of whether or not the Secretary's
17 office was in possession of the copy of the recount election
18 package zipped and unmodified from the December 2020
19 transmission from Fulton County.

20 And on December the 2nd of 2021, Mr. Tyson responded
21 that the Secretary's office was unable to locate any such
22 files. As I said on December 21 then, over a month ago, we
23 requested to both Ms. Ringer and Mr. Tyson that they attempt to
24 locate where a complete recount election project file was so
25 that those items that had been the subject of the Court's order

1 could be delivered to us. And to date, we have received
2 nothing in response to that request.

3 The importance of the files really can't be
4 exaggerated. Although I would try to exaggerate it, if I
5 could. It is already clear from the records that we received
6 and the detailed analysis that was conducted of the records we
7 received on December the 8th that there has been a substantial
8 amount of tabulation error in connection with the materials
9 that -- the ballots that we received and many of those from the
10 home precincts of the named plaintiffs in the case --

11 THE COURT: All right. So then why do you need more
12 than that? If you have that and they are from the home
13 precincts, why -- and you are -- why -- I mean, I am --
14 frankly, I mean, there have been lawsuits about tabulation and
15 all this. But this is not a tabulation case.

16 MR. ICHTER: Well, Your Honor, I would say two things
17 to that. Thing Number 1 is, when you are putting together a
18 puzzle -- and that is essentially what we're doing here -- and
19 you are missing 18,000 pieces, you are going to be missing a
20 substantial part of the picture.

21 The second part is, if there are 18,000 ballot images
22 that are missing and the ballot images we already have indicate
23 that there are significant discrepancies, double counting of
24 ballots, triple counting of ballots, it raises the question of,
25 well, what are they not showing us? Why is it that these

1 18,000 have been separated and isolated from us? What will
2 those show?

3 And to the extent that the answer to that is that
4 they are problematic for either Fulton County or the Secretary
5 of State or the State defendants, there are spoliation issues
6 that need to be considered because --

7 THE COURT: All right. Let me get back -- and
8 maybe -- maybe I erred on December 2nd or 3rd in ruling that
9 you could have it.

10 But I don't understand how this is connected to your
11 theory of the case. I mean, I understand why it is connected
12 to the theory of people who were challenging the recount or
13 Mr. Favorito's lawsuit.

14 But I don't understand how it is -- how it is
15 directly related here. I could understand it if it is a
16 precinct that you can -- where your theory has been Plaintiff A
17 is voting at that precinct and she gives an affidavit saying, I
18 really think -- I'm very uncomfortable whether my vote has been
19 counted. And it is among the absentee ballots and/or it is
20 among the electronic ballots, you know, depending on what they
21 say. So that precinct becomes relevant.

22 But I don't understand -- you know, you seem to be
23 taking us in a whole other direction.

24 MR. ICHTER: Well, Your Honor, for one thing, with
25 respect to the Stark report, the opinion of Stark that has been

1 submitted, it shows that one of the worst precincts for
2 inaccuracies and mistabulations was Donna Curling's precinct,
3 which was the RW01 precinct. And with more detailed
4 information in hand, we can identify at precinct level
5 discrepancies and mistabulations to the point where the experts
6 are capable of testifying that there is no way to assure that
7 the voters' in those precincts votes were properly counted or
8 given the proper weight in connection with the outcome of the
9 elections.

10 And so to that extent, they have injury in fact on an
11 individual basis. So --

12 THE COURT: Yeah. But that is not what you are
13 asking for at this point. I mean, you are -- you are looking
14 for the -- you have a conspiracy theory about the 18,000
15 missing -- allegedly missing ballots.

16 There were observers who watched the recount of --
17 three times of the presidential race. One of the things that
18 Mr. Stark talks about is -- or Dr. Stark is relating to
19 down-ballot voting. And that is something different.

20 But that is -- you know, we have learned a lot in the
21 course of this litigation that mistakes not only are made here,
22 made all over the place and historically have been made on -- I
23 mean, it is a rough -- elections are rough at one level.

24 But I am -- but you are varying between -- you want
25 to know it for the entire state and you want to go through

1 every single one. And I don't know what the problems were
2 in -- all of the problems that might have been in Fulton County
3 or some other county or whether they were typical or not.

4 But it seems to me that you were looking at this
5 ultimately for standing. So now you are taking it way beyond
6 that.

7 MR. ICHTER: Your Honor, first of all, I would let
8 you know that the order was entered by consent. There was a
9 dispute concerning these documents. And ultimately Fulton
10 County agreed to produce them. And the content of the order
11 was essentially a consent order.

12 And then this is not a conspiracy theory because
13 we're not articulating a theory with respect to what happened
14 to those 18,000. We want to know what happened. And we have
15 got a real live version of hide-the-ball being played here
16 because we've got Fulton County who is supposed to originally
17 have the documents and by statute should have copies of all of
18 these documents and other election papers. And they say they
19 don't. They say they turned them over to the Secretary of
20 State.

21 And then the Secretary of State, having had the ball
22 passed to them, had it behind their back and saying, oh, we
23 don't have that. We don't know if anybody has the ball. We
24 don't know if the ball exists any more. And if the ball
25 doesn't exist any more, that is something --

1 THE COURT: All right. I'm not going there. I'm not
2 going there. I'm not letting you take -- proceed that way
3 either.

4 I'm going to just simply ask the State and the Fulton
5 County counsel to please confer regarding this and try to
6 determine is there -- what has happened so I can get a proper
7 response.

8 MR. ICHTER: (Unintelligible).

9 THE COURT: I know. But you are adding -- I mean, I
10 don't need to add more rhetoric to the heat we're already
11 dealing with.

12 MR. ICHTER: Okay. And, Judge, please forgive me.
13 I'm not accusing anybody of anything. We're just expressing --

14 THE COURT: Well -- but you are. You are. So I'm
15 not -- I accept the excusing. But I don't think we need to
16 make anything here more inflammatory.

17 So I don't -- we don't know your -- it is
18 speculation. There no doubt are -- there is no doubt there
19 could be adding problems. But that is something different than
20 the speculation that was going on.

21 So I would just simply ask counsel to try to -- for
22 both defendants to try to get to the bottom of this. And you
23 can schedule a time to talk with me about it next week.

24 MR. LOWMAN: This is David Lowman from Fulton County.
25 And I certainly hope nobody is accusing anybody at Fulton

1 County of doing anything untoward. But that's what it sounded
2 like.

3 But we will certainly take Your Honor's direction and
4 confer with counsel for State defendants and make sure that we
5 provide what we thought we already provided.

6 Certainly we will make sure that we are able to
7 locate and provide that .SHA and the .dvd files. I understand
8 that is something that plaintiffs claim that they don't have.
9 We will go back and make sure we are in full compliance with
10 the December 3rd court order, which we certainly aim to do and
11 thought we had.

12 And so a lot of these accusations flying around are
13 pretty astonishing. But we will do what Your Honor wishes and
14 confer with counsel for State defendants and make sure we have
15 provided that we should have provided.

16 THE COURT: All right. And, you know, you can all
17 call Mr. Martin and schedule a time to talk with me about
18 things. But I would really -- I'm directing you-all not to --
19 not to make this bigger than it may be.

20 And let me hear what exactly -- what is in front of
21 me though is a narrower issue. And I just want to know what
22 the production is and what the issues are and if there is a
23 problem that there is a problem. I don't want to dramatize it
24 beyond that.

25 MR. ICHTER: Understood.

1 MR. LOWMAN: Understood, Your Honor. Thank you.

2 THE COURT: Are there any other major issues? I know
3 there were other things lurking, but I'm --

4 MR. ICHTER: Your Honor, there were the third
5 document requests that Coalition plaintiffs served on Fulton
6 County. We have outlined in recent communications that were
7 resent to Fulton County today -- it was either today or -- they
8 are running together. It was either today or yesterday --
9 where we identified, I believe, six requests for production of
10 documents that there were issues about that we had not received
11 appropriate documentation. And we haven't heard back on that.
12 So I'm not really sure --

13 THE COURT: Well, why don't you continue to talk with
14 them about it and when you-all -- and then when you make the
15 scheduled appointment to talk with me about these issues with
16 Fulton County's counsel and with the State's counsel, if they
17 are relevant in this, then provide me some outline of what
18 issues we're going to be looking at and make a joint -- do a
19 joint submission -- all right? -- in advance.

20 MR. ICHTER: We will do that.

21 THE COURT: All right. Great.

22 All right. Well, I hope everyone is well, despite
23 having to spend this many hours together on this phone call.
24 And be -- be careful. And I'll be looking for the few things
25 that were going to be sent to me in the next number of days.

1 MR. ICHTER: Thank you, Your Honor.

2 THE COURT: Anything else from State counsel or
3 Curling counsel?

4 MR. RUSSO: This is Vincent Russo, Your Honor.

5 Nothing further from the State.

6 THE COURT: Okay. Thank you very much. This
7 concludes our conference then. Be well.

8 MR. ICHTER: Thank you.

9 **(The proceedings were thereby concluded at 3:12**
10 **P.M.)**

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1 C E R T I F I C A T E
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3 UNITED STATES OF AMERICA
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NORTHERN DISTRICT OF GEORGIA
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I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of
the United States District Court, for the Northern District of
Georgia, Atlanta Division, do hereby certify that the foregoing
100 pages constitute a true transcript of proceedings had
before the said Court, held in the City of Atlanta, Georgia, in
the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the
28th day of January, 2022.

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17 *Shannon R. Welch*
18 SHANNON R. WELCH, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
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